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Supreme Court, U.S.
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No. 06-731

In the
Supreme Court of the United States

CORBIN SMYTH,

Petitioner,

v.

STEPHEN CARTER, ATTORNEY GENERAL OF THE STATE OF INDIANA, INDIANA DEPARTMENT OF THE ATTORNEY GENERAL, TIM BERRY, TREASURER OF THE STATE OF INDIANA AND THE INDIANA DEPARTMENT OF TREASURY,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Indiana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Fifty States and the District of Columbia have adopted state law programs known as Unclaimed Property Acts to hold in custody dormant personal property and reunite it with its owners. Unclaimed property is not escheated to the State in the traditional sense (title is not transferred from the owner to the State) while held in custody, but most States do invest the property, earn interest on the funds, and use those earnings to fund state programs. However, Indiana and other States ignore the ancient property right that "interest follows principal," and take all earnings on unclaimed property without compensating the property owners. The questions presented by this petition are:

1. Is the State of Indiana's confiscation of the interest earned on unclaimed private property held in its custody and used for public purposes subject to the Takings Clause of the Fifth Amendment to the U.S. Constitution?
2. May a State abolish a fundamental private property right by legislative fiat and without any judicial hearing?

PARTIES

Petitioner Corbin Smyth is an individual suing on behalf of himself and a putative class of similarly situated persons. Petitioner was the Plaintiff and Appellant in the state court proceedings.

Respondent Stephen Carter is the Attorney General of the State of Indiana. Respondent Tim Berry is the Treasurer of the State of Indiana. The other Respondents, the Indiana Department of the Attorney General and the Indiana Department of the Treasury, are both political sub-divisions of the State of Indiana, which also has an interest in this case. Respondents were the Defendants and Appellees in the state court proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Corbin Smyth petitions for a writ of certiorari to review the opinion and judgment of the Court of Appeals of Indiana, issued on April 12, 2006. On August 24, 2006, the Supreme Court of Indiana declined to review the decision of the Court of Appeals of Indiana, which affirmed the Marion County Circuit Court's dismissal of Mr. Smyth's claim for a failure to state a claim upon which relief could be granted.

OPINIONS BELOW

The opinion and judgment of the Marion County Circuit Court is unreported and reprinted in the Appendix. Pet. App. 1-21. The opinion of the Court of Appeals of Indiana, affirming the trial court's decision on different grounds, is reported as *Smyth v. Carter*, 845 N.E.2d 219 (Ind. App. 2006) and is reprinted in the Appendix. Pet. App. 22-31. The order of the Supreme Court of Indiana denying discretionary review of the opinion and judgment of the Court of Appeals is unreported. Pet. App. 32-33.

JURISDICTION

The Supreme Court of Indiana denied discretionary review of the Court of Appeals opinion and judgment on August 24, 2006. Pet. App. 32-33. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fifth Amendment state:

> nor shall [any person] be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

The relevant provisions of the Fourteenth Amendment state:

> nor shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const. Amend. XIV, § 1.

The Indiana Unclaimed Property Act, Ind. Code § 32-34-1-1 *et seq.*, is reprinted in the Appendix. Pet. App. 34-116.

STATEMENT OF THE CASE

This petition asks the Court to resolve conflicting interpretations of the Fifth Amendment and the very nature of private property rights by the state courts and lower federal courts. Specifically, the central issue here is whether earnings generated on unclaimed property while it is held in custody by a State is a constitutionally cognizable property right.

Indiana is one of fifty States and the District of Columbia which operate unclaimed property programs. Pet. App. 240. As of 2003, between $28 and $35 billion worth of unclaimed property was held in custody by the various States, with accumulations growing at a faster rate each year. Pet. App. 169, 240-241. As of 2002, Indiana alone held $198 million worth of unclaimed property in custody for tens of thousands of private citizens. Pet. App. 123.

The National Conference of Commissioners on Uniform State Laws, who drafted the uniform acts eventually adopted by at least thirty-eight of the fifty States and the District of Columbia, have identified three goals of the Acts: to protect unknown or unlocatable owners of property from permanently losing it; to relieve holders from annoyance, expense, and liability associated with maintaining their own unclaimed property funds; and to provide States with a method for raising revenue (keeping unclaimed property indefinitely or eventually escheating it at a later date). Pet. App. 158.

All States use these programs to fund their general fiscs or for specific state initiatives. Indiana invests its Unclaimed Property Fund in interest-bearing accounts, with the proceeds of the principal and the interest used to fund various state educational infrastructure projects. Pet. App. 121-122.

All unclaimed property statutes operate in essentially the same manner. Each requires a transfer to the State of personal property from "holders"—third party possessors of property owned by another, such as banks with inactive accounts, utility companies with unreturned security deposits, or corporations with stock and unclaimed dividend payments. Pet. App. 240-241. Such property must be transferred to the State after a statutorily-prescribed period of inactivity, ranging anywhere from as short as one year to as long as fifteen years or more. Pet. App. 58-62.

Under the Indiana Unclaimed Property Act, such property is *presumed* abandoned. Pet. App. 27. As the Indiana Court of Appeals recognized, however, the owner retains title to his property at all times, and can recover it from the State at any time by simply filing a claim. Pet. App. 27-28. In other words, the Act is not based on the State's power to escheat, *i.e.*, to take title to ownerless property. Pet. App. 26, 28, 237.

In this case, the holder, Topps, Inc., held forty shares of its stock owned by Mr. Smyth, as well as certain cash dividends that had been declared but not delivered to him Pet. App. 1-2. As required by the Indiana Unclaimed Property Act, on December 11, 2001, Topps, Inc. transferred that private property to the State of Indiana. Pet. App. 1-2. On January 30, 2002, the State sold Mr. Smyth's shares and together with the undelivered dividends deposited the $406.34 in total proceeds in the Unclaimed Property Fund. Pet. App. 121-122. The Unclaimed Property Fund had been, was, and is invested in interest-bearing accounts that generate net-positive earnings. Pet. App. 121-122.

Mr. Smyth submitted a claim for his property in December 2003. Pet. App. 2. Although the State of Indiana returned to Mr. Smyth the $406.34 in stock proceeds and dividends earned before the State took possession of the stock, acting pursuant to Ind. Code § 32-34-1-30(b), it did not return the interest and dividends earned on the stock and proceeds during the time that it held that property in protective custody pursuant to the Act.[1] Pet. App. 2, 125-126. Rather, despite never taking title to Mr. Smyth's principal and never holding a judicial proceeding to determine whether Mr. Smyth *in fact* abandoned his property, the State simply took his earnings for its own use, never compensating him for that taking.

A. The Circuit Court Proceedings

On March 22, 2004, Mr. Smyth filed his Complaint for Damages in the Circuit Court of Marion County, Indiana, challenging the State's confiscation of earnings on his unclaimed property as an unconstitutional taking without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and its state counterparts. Pet. App. 117-144. The circuit court dismissed his Complaint with prejudice for failure to state a claim. Pet. App. 20. That court reasoned that Indiana's Unclaimed Property Act is an escheat act and that Mr. Smyth had abandoned his property. Pet. App. 8-9, 13. Furthermore, rejecting this Court's holding in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 170, 118 S.Ct. 1925, 1933 (1998), the circuit court found, without any factual basis, that Mr. Smyth suffered no pecuniary loss reasoning that without the operation of the Unclaimed Property Act, Mr. Smyth would not have earned anything on his property prior to its being delivered into the State's custody.[2] Pet. App. 13-14. Finally, the circuit court found Mr. Smyth's claim barred because of an alleged failure to file a notice of a tort claim, despite the obvious and unmistakable constitutional nature of Mr. Smyth's claim. Pet. App. 19-20.

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[1] Section 32-34-1-30(b) of the Act provides in relevant part that "the owner is not entitled to receive dividends, interest, or other increments accruing after delivery of the property to the attorney general[.]" Pet. App. 81.

B. The Decision of the Court of Appeals of Indiana

Mr. Smyth appealed the trial court's decision to the Court of Appeals of Indiana. That court affirmed the trial court, but for entirely different reasons. In its opinion of April 12, 2006, the Court of Appeals rejected the circuit court's finding that the Unclaimed Property Act is an escheat act (that is, that the State took title to unclaimed property) and that Mr. Smyth had abandoned his property. Pet. App. 26-28. The Court of Appeals also acknowledged that the State of Indiana recognized the age-old principle of property law that "interest follows principal," that is, whoever owns the principal also owns the earnings thereon as an incident of ownership. Pet. App. 29.

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[2] That is clearly wrong. Topps, Inc. paid dividends on Mr. Smyth's stock for at least part of the time he owned it prior to its delivery to the State. Pet. App. 2.

The Court of Appeals, however, created a novel exception to the Fifth Amendment's Taking Clause, reasoning that a State could take private personal property without compensation if the owner was not using it. Pet. App. 30. In so doing, the Court of Appeals found a State could create new conditions on property rights recognized since the founding of the nation by simply passing a statute. Under this rationale, the State does not even need to prove in a judicial proceeding or hearing that the conditions it requires owners to meet to keep their property have not been met.

C. The Decision of the Supreme Court of Indiana

Mr. Smyth appealed the decision of the Court of Appeals to the Supreme Court of Indiana, a procedure termed a petition to transfer jurisdiction. On August 24, 2006, the Supreme Court of Indiana declined to review the Court of Appeals' decision. Pet. App. 32-33.

REASONS TO GRANT THE WRIT OF CERTIORARI

Indiana has weighed in on an important issue concerning the constitutionality of Unclaimed Property Acts that conflicts with prior precedent from Illinois and the federal courts. However, Indiana has not only misread the Fifth Amendment, it has created a new and dangerous exception to the Fifth Amendment's Takings Clause that, if allowed to survive, will allow governments the power to define away all property rights simply by legislative fiat, and without a judicial hearing. In the midst of renewed public interest in the Takings Clause spurred by other recent judicial decisions and growing state budget deficits that provide an almost irresistible incentive for States to find new and creative sources of funding, the time is ripe to deal with this split among the States and define the fundamental protections of the Fifth Amendment. Earnings on billions of dollars of private property are at stake—earnings that themselves are private property and that States are supposed to be holding in custody for their owners.

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE STATES AS TO WHETHER THE RETENTION OF THE EARNINGS ON THE BILLIONS OF DOLLARS OF UNCLAIMED PROPERTY IS A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

Relying on the principle that "interest follows principal," owners of unclaimed property in several States have challenged their unclaimed property acts.[3] Most States, like Indiana, invest the unclaimed property and generate millions of dollars in earnings on the property they hold in custody for the owners. But by confiscating the earnings on private property, these States are alleged to have violated the Takings Clause of the Fifth Amendment.[4]

The highest courts of Indiana and Illinois have now split on this important interpretation of the Fifth Amendment.

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[3] The Unclaimed Property Acts of Alabama, Texas, California, North Carolina, Ohio, Pennsylvania and Florida have also been challenged under the Fifth Amendment.

[4] The unclaimed property statute in each of these states is substantially similar, all having emanated from one or more of the Uniform Unclaimed Property Acts promulgated by the National Conference of Commissioners on Uniform State Laws. Pet. App. 212-213, 233.

On one hand, the Supreme Court of Illinois followed this Court's rulings in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233, 123 S.Ct. 1406, 1418 (2003), *Phillips*, 524 U.S. at 172, 118 S.Ct. at 1934, and *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163-164, 101 S.Ct. 446, 451-453 (1980), holding that the right to collect interest is an "incident of ownership" of the principal, and that the State may not claim the interest as "public funds" while at the same time acknowledging that the principal is privately owned. *Canel v. Topinka*, 212 Ill.2d 311, 818 N.E.2d 311, 324-25 (Ill. 2004) (found in the Appendix at Pet. App. 145-167). In *Canel*, the Supreme Court of Illinois held:

> Defendants further claim that the state could have acquired the shares of stock and dividends thereon because the shares of stock were abandoned property. We know of no common law rule which supports defendants' position that, by virtue of plaintiff's presumed abandonment of his property, the dividends declared as an incident of ownership of the property become the property of the state....We reject the notion that the state, as custodian of stock placed in its hands for safekeeping, may claim that it is entitled to the dividends issued on the stock....At all times the shares of stock remained the private property of plaintiff. Under the circumstances, the dividends, as an incident of ownership, were also private property.

Canel, 212 Ill.2d at 331, 818 N.E.2d at 324-25. Pet. App. 164-165.

On the other hand, the Supreme Court of Indiana declined to review a ruling of the Court of Appeals of Indiana that held that the State does not take private property when it confiscates the earnings on the unclaimed property it holds in custody. Pet. App. 30.

Given the billions of dollars held in custody (and the hundreds of millions of dollars of earnings) by the several States and the District of Columbia, the answer to this important constitutional question will have a substantial impact on private property rights and state finances across the country. This Court therefore should grant a writ of certiorari in order to resolve the conflict among the many courts that have addressed the important constitutional question presented in these cases, and provide guidance to the other courts dealing with this issue.

II. THE INDIANA COURT'S DECISION ALLOWS THE STATES TO LEGISLATIVELY DEFINE OUT OF EXISTENCE TRADITIONAL PROPERTY RIGHTS WHICH WOULD ALLOW STATES TO SIDESTEP THE FIFTH AMENDMENT

All of the currently pending cases in the state courts and the two cases decided by Illinois and Indiana involve a crucial issue of interpretation of the Fifth Amendment's Taking Clause, *i.e.*, what exactly is a taking?[5] However, unlike in regulatory takings cases which require ad hoc inquiries, the taking at issue here involves an outright confiscation of the property interest at issue, *i.e.* the earnings generated on personal property. *Brown*, 538 U.S. at 233, 123 S.Ct. at 1417. Thus, this Court's jurisprudence "is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules." *Id.* "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.* (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 71 S.Ct. 670 (1951)).[6]

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[5] *See, e.g., Sogg v. White*, 2006 WL 2706534 (Ohio Com.Pl. August 7, 2006) (found in the Appendix at Pet. App. 186-211).

[6] There can be no doubt that Mr. Smyth had an interest in his

(continued...)

The Court of Appeals of Indiana ignored these protections and created a new and unwarranted exception to the Fifth Amendment, ruling that: A State may take a private property interest without just compensation upon the "owner's failure to act," that is, to make use of their property. Pet. App. 29-30. Besides the obvious lack of any textual support for this new exception in the Constitution itself and the clear conflict with the very idea of private property (*i.e.*, who gets to decide what, if anything, to do with one's own property), Indiana's Fifth Amendment jurisprudence directly conflicts with this Court's past Fifth Amendment doctrine. In fact, Justice Holmes warned of such encroachments over eighty years ago, commenting on the slippery slope that would result from creating exceptions or qualifications to the Fifth Amendment:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922).[7]

(...continued)

property when it was taken by Indiana. The Court of Appeals of Indiana recognized this when it found Mr. Smyth owned his unclaimed property when it was held by the state and that Indiana citizens have always enjoyed the property right of "interest follows principal." Pet. App. at 27-29.

[7] Of course, Justice Holmes was writing about the tension

(continued...)

But the Indiana decision does more than just create a new exception to the Fifth Amendment; it also allows for a State to transform private property into public property by legislative fiat without compensation (here, by imposing new conditions for recognized property rights). Such sidestepping of the Fifth Amendment has been flatly prohibited by this Court for decades. For example, in *Webb's*, this Court held:

> [A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

449 U.S. at 164, 101 S.Ct. at 452. This principle was reaffirmed by this Court in *Phillips*:

> In other words, at least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.

Phillips, 524 U.S. at 167, 118 S.Ct. at 1931 (citing *Webb's*, 449 U.S. at 164, 101 S.Ct. at 452 and *Lucas v. South*

(...continued)
between the police power and the prohibitions of the Fifth Amendment regarding takings of private property. In this case, the state's police power has never been invoked as a rationale for Indiana's confiscation of earnings on private property pursuant to its Unclaimed Property Act. The only legitimate state power ever advanced by the State for the Unclaimed Property Act was the sovereign's power to escheat ownerless property. However, the Court of Appeals of Indiana has found its Unclaimed Property Act is not an escheat act. Pet. App. 26.

Carolina Coastal Council, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 2900-2901 (1992).

Followed to its logical conclusion, the Indiana court's decision would allow States to require conditions for use of property (*e.g.*, to maximize the tax revenue from such property, to maximize the public's enjoyment of the property, *etc.*), the failure of which would result in the taking of property interests of any kind (*e.g.*, possession, right of exclusive use, *etc.*). These were precisely the types of government machinations the Fifth Amendment was designed to prohibit. *Webb's*, 449 U.S. at 164, 101 S.Ct. at 452.

Finally, the Court of Appeals of Indiana mistakenly relied on *Texaco, Inc. v. Short*, 454 U.S. 516, 530, 102 S.Ct. 781, 792 (1982), for its over-reaching Fifth Amendment jurisprudence. *Texaco* did not even deal with a governmental taking. The Indiana Supreme Court itself recognized that distinction in the opinion that led to this Court's subsequent review:

> We agree with appellant that extinguishment of mineral interest under the statutory scheme does not involve an exercise by the State of its power of eminent domain. The State through [the Mineral Lapse Act] is not actually taking the mineral interest for its own use and benefit. Consequently, Art. I, § 21 [The Takings Clause of Indiana's Constitution] does not provide an applicable standard of review of this statute.

Short v. Texaco, Inc., 273 Ind. 518, 526-27, 406 N.E.2d 625, 631 (1980).

In fact, this Court's decision in *Texaco* flatly rejected Indiana's reading of the Fifth Amendment in the case at bar—where the State confiscates for itself the private property right without compensation:

> If Indiana were by simple fiat to . . . transfer [pre-existing mineral interests] to itself . . . that action would surely be unconstitutional and unenforceable - at least absent just compensation. That is not the case here, . . . as the Court ['s majority] points out[.]

454 U.S. at 542, 102 S.Ct. at 799 (J. Brennan, dissent).[8]

III. INDIANA'S UNCLAIMED PROPERTY ACT VIOLATES DUE PROCESS BECAUSE PRIVATE PROPERTY IS TAKEN WITHOUT ANY JUDICIAL HEARING

Neither Mr. Smyth nor any of the private property owners whose unclaimed property has been held in custody by Indiana have ever received a judicial hearing prior to the earnings on their property being taken. Pet. App. 1-5, 120-123. In fact, Indiana's statute does not require the State to even prove that property is ownerless or abandoned, nor is any judicial proceeding needed under the Indiana Unclaimed Property Act before an owner's property interest in the accrued earnings on his or her property is confiscated. Pet. App.

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[8] Other courts have also rejected the relevance of *Texaco* to state confiscation of property. *See Smolow v. Hafer*, 2005 WL 1377849, *4 (E.D.Pa. June 8, 2005) ("This Court concludes that defendants' reliance ... on *Texaco* ... fails to address plaintiffs' claim" that the state engaged in an uncompensated taking when it retained the earnings on plaintiff's unclaimed property); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 217 F.Supp.2d 206 (D.R.I. Aug. 20, 2002), *aff'd*, 337 F.3d 87 (1st Cir. 2003), *cert denied*, 540 U.S. 1090 (2003). ("Here, the State assumes title, without compensation, allowing the public to permanently physically occupy the record owner's land[.] . . . *Texaco v. Short* does not, as a matter of law, bar plaintiffs takings claim.").

34-116. As such, Indiana's Act, and the Court of Appeals interpretation of it, violates the Fifth and Fourteenth Amendment's due process requirements.

This Court has repeatedly held that procedural due process requires the government to obtain a judicial decree that property has in fact been abandoned (*i.e.* the owner has intentionally relinquished all interest in the property), or is otherwise subject to escheat, before property can be confiscated. *See, e.g., Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 241, 64 S.Ct. 599, 604 (1944) (concluding that "subject to the requirements of procedural due process, that prior to a judicial decree of actual abandonment, the depositors will not be deprived of their property by the surrender of their bank accounts to the state."); *Hamilton v. Brown*, 161 U.S. 256, 275, 16 S.Ct. 585, 592 (1896) (a court hearing and notice is required before a State may take title to private property through escheat). Numerous state courts agree. As held by the New Jersey Supreme Court:

> [I]t is insisted that the state may escheat personal property administratively without judicial action.. With this view we find ourselves in complete disagreement. Court action has been uniformly required in escheat proceedings. If the state may appropriate property other than contraband to its absolute use without compensation, a great and unbounded inroad on private property rights will have made its way into the law without any Constitutional warrant.

State v. Otis Elevator Company, 12 N.J. 1, 18, 95 A.2d 715, 723 (1953). *See also Canel*, 212 Ill.2d at 323, 818 N.E.2d at 327; *State v. Phoenix Savings Bank & Trust Co.*, 60 Ariz. 138, 142, 132 P.2d 637, 639 (Ariz. 1942).

In today's society, such a judicial proceeding will not be simply *pro forma*. Many circumstances could explain why property has remained dormant (for as short as one year or as long as fifteen years) but has not been intentionally abandoned. An individual might become ill, for example, and forget to collect some bit of his property. Should the State have the right to seize that individual's property interests without a judicial determination? Or an individual could die without leaving a complete record of all of his bank accounts. Should his heirs, who only discover the bank accounts after their proceeds have been delivered to the State as unclaimed property, be denied the full property interest in their inheritance and have that interest transferred to the government without a hearing or compensation?[9] If Indiana wants to confiscate ancient, core property rights of its citizens by placing conditions on their use (or non-use), then it must at the very least prove those conditions have been met in a judicial proceeding.

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[9] It may even be the case that the holder of the property should never have reported the property to the state as unclaimed property in the first place. The Ninth Circuit Court of Appeals recently described just that circumstance in *Taylor v. Westly*, 402 F.3d 924 (9th Cir. 2005), where a husband and wife owned shares of stock in Intel Corp.:

> Neither of these plaintiffs were really hard to find, nor did they mean to abandon their property. Chris Taylor acquired his stock in Intel because he worked for Intel for a number of years. His wife was general counsel for Intel in Europe. Intel corresponds with him regarding his stock and his pension fund and knows his address. He still has his original stock certificates, but the Controller has rendered them worthless by getting duplicate stock certificates and selling the shares.

402 F.3d at 928.

CONCLUSION

Indiana's Unclaimed Property Act, and the Court of Appeals of Indiana's decision relating to it, takes a private property interest—the right to any earnings generated on one's property—for the State without any compensation. Such an Act violates the letter and the spirit of the Fifth Amendment, which stands as one of the most important protections of private property rights found in our Constitution. Rather than allow the split in the States to continue regarding the fundamental nature of private property rights, this Court should grant a writ of certiorari to resolve the conflicting rules established by various state and federal courts with respect to the question of whether the retention of earnings that accrue on unclaimed property held by the States without compensation is a taking in violation of the Fifth and Fourteenth Amendments; to ensure that States may not define out of existence traditional property rights without compensation; and ensure that when a State acts to take property, it does so in accordance with due process of law.

Respectfully submitted,

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APPENDIX

STATE OF INDIANA) IN THE MARION CIRCUIT COURT
) SS:
COUNTY OF MARION) CAUSE NO. 49C01-0406-CT-001945

CORBIN SMYTH, individually
and on behalf of all others similarly situated,

Plaintiff,

v.

STEVE CARTER, Attorney General of the State of Indiana, OFFICE OF THE ATTORNEY GENERAL, State of Indiana, TIM BERRY, Treasurer of State of Indiana, and OFFICE OF THE TREASURER, State of Indiana,

Defendants.

ORDER DISMISSING CASE

This matter comes before the Court on the Motion to Dismiss filed by the Defendants, Steve Carter, Attorney General of the State of Indiana, Office of the Attorney General, State of Indiana, Tim Berry, Treasurer of State of Indiana, and Office of the Treasurer, State of Indiana (hereinafter collectively referred to as "the State"). The Court, having considered said Motion and being duly advised in the premises, now finds as follows:

FINDINGS OF FACT

1. Plaintiff Corbin Smyth ("Smyth") owned forty (40) shares of Topps, Inc. stock in the late 1980's. (Complaint, ¶29).

2. Smyth's stock and related cash dividends were delivered to the Attorney General by Topps, Inc. on December 11, 2001. *(Id.)*
3. Smyth's stock was valued *in toto* at $485.20 on December 11, 2001 and was sold *in toto* for $396.79 by the Defendants on January 30, 2002. *(Id)*
4. Smyth made a claim for his stock in December 2003. *(Id.)*
5. On January 13, 2004, the State Treasurer remitted to Smyth $406.34, representing the sale value of the stock plus $9.95 cash dividends earned prior to December 11, 2001. *(Id.)*
6. The $406.34 paid to Smyth did not include "interest and dividends earned on his stock during the preceding two years." *(Id.)*

CONCLUSIONS OF LAW

A. Standard of Review

7. This matter is before the Court on a Motion to Dismiss the Plaintiff's Complaint filed by the State under 12(B)(6) of the Indiana Rules of Trial Procedure.
8. A motion to dismiss under Rule 12(B)(6) of the Indiana Rules of Trial Procedure tests the legal sufficiency of a claim, not the facts supporting it. *Phelps* v. *Sybinsky,* 736 N.E.2d 809, 813 (Ind. Ct. App. 2000), *trans., denied.* The trial court must view the complaint in the light most favorable to the non-moving party, drawing every reasonable inference in that party's favor. *Town of Plainfield* v. *Town of Avon,* 757 N.E.2d 705, 710 (Ind. Ct. App. 2001), *trans., denied.* The trial court must dismiss "if it is apparent that the facts alleged in the

complaint are incapable of supporting relief under any set of circumstances." *Id.*

9. "[W]hen the validity of a statute is challenged, [the court] must begin with a 'presumption of constitutionality.'" *State* v. *Lombardo,* 738 N.E.2d 653, 655 (Ind. 2000) (quoting *State* v. *Downey,* 476 N.E.2d 121, 122 (Ind. 1985)). "The burden to rebut this presumption is upon the challenger, and all reasonable doubts must be resolved in favor of the statute's constitutionality." *Id.*

10. To sustain a facial constitutional challenge to a statute, under either federal or state constitution, plaintiff bears the burden of demonstrating that there is no set of circumstances under which the statute can be constitutionally applied. *Baldwin v. Reagan,* 715 N.E.2d 332 (Ind. 1999). A statute under constitutional attack is "clothed with the presumption of constitutionality." *Indiana Wholesale Wine & Liquor Co., Inc.* v. *State ex rel. Indiana Alcoholic Beverage Commission,* 695 N.E.2d 99, 108 (Ind. 1998); *Fleming* v. *International Pizza Supply Corp.,* 707 N.E.2d 1033,1037 (Ind. Ct. App. 1999) (citation omitted). The party challenging the statute bears the burden of proof, and the Court should resolve all doubts as to the statute's constitutionality against him. *Boehm* v. *Town of St. John,* 675 N.E.2d 318, 321 (Ind. 1996). The Court should not hold any statutory provisions unconstitutional if there are two reasonable interpretations of the statute, one of which is constitutional and the other not. *Id.*

B. The Unclaimed Property Act constitutionally defines property rights in abandoned property.

11. The Indiana Unclaimed Property Act is codified at Ind. Code § 32-34-1-2 *et seq.* (the "Unclaimed Property Act").

12. Under the Unclaimed Property Act's framework, if a holder[1] does not receive any indication of interest in the property for a statutorily-prescribed period, the property is presumed abandoned. Ind. Code § 32-34-1-20(c).

13. The statutorily prescribed period of time after which stocks, such as the stock in Topps, Inc. owned by Smyth, are presumed abandoned is five years. Ind. Code § 32-34-1-20(c)(10).

14. The Unclaimed Property Act's presumption of abandonment applies to various types of specified properties and includes "all other property" not specifically covered by the Unclaimed Property Act. Ind. Code § 32-34-1-20(c)(l) - (15).

15. Once the property is presumed abandoned by the operation of the Unclaimed Property Act, an entity holding the abandoned property, such as Topps, Inc. in the instant case, must report the property to the Attorney General and provide certain information. *See* Ind. Code § 32-34-1-26.

16. Before filing its report, the holder must send written notice to the owner of the property of such action if the holder possesses the owner's correct address and if the value of the property is at least fifty dollars ($50.00)[2]. Ind. Code § 32-34-1-26(e).

17. On the date the report is filed, the holder shall pay or deliver to the Attorney General the property that is described in the report as unclaimed. Ind. Code § 32-34-1-27.

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[1] "Holder" means a person obligated to deliver or pay to the owner property that is subject to this chapter. Ind. Code § 32-34-1-8.

[2] Subsection (e) also mandates that the claim of the apparent owner be not barred by the statute of limitations. Ind. Code § 32-34-1-26(e)(2)

18. Once the abandoned property is delivered to the Attorney General, the Attorney General must publish notice no later than November 30th of the year immediately following the year in which the unclaimed property has been delivered to the Attorney General. Ind. Code § 32-34-1-28(a). The Attorney General must publish the notice at least once each week for two successive weeks in a newspaper of general circulation in the county of the last known address of the owner, Ind. Code § 32-34-1 -28(b), or, if there is no last known address or if the address is out-of-state, then the publication may be made in the county where the holder has his principal place of business or any other county that the Attorney General reasonably selects. Ind. Code § 32-34-1-28(c). The notice must provide, among other things, information about the unclaimed property, and must state that its return to the owner is available upon request. Ind. Code § 32-34-1-28(d)(4).

19. Generally, the State takes custody of unclaimed property if it is presumed abandoned. Ind. Code § 32-34-1-21. However, the Unclaimed Property Act does not provide that the State is merely a "custodian" of all the incidents of the abandoned property.

20. The Unclaimed Property Act states that an owner is entitled to receive any dividends, interests, or other increments realized or accruing on the unclaimed property at or before delivery to the Attorney General. Ind. Code § 32-34-1-30(a).

21. The owner is not entitled to receive dividends, interest, or other increments accruing on the unclaimed property *after* it has been delivered to the Attorney General. Ind. Code § 32-34-1 -30(b) (emphasis added).

22. Under the authority granted by Ind. Code § 32-34-1-30, the State retains the interest earned on unclaimed

property in its custody and returns the principal to the reclaiming owners.

23. Smyth has made a facial attack on Ind. Code § 32-34-1-30 by asserting that it constitutes taking of private property without just compensation and is therefore unconstitutional under the Fifth Amendment of the United States Constitution, as applicable to the State through the Fourteenth Amendment; and Article I, Section 21 of the Indiana Constitution.

24. Smyth seeks as relief, in part, a declaration that "the retention of dividends, interest and other accruals, including the difference in value of securities between the date of delivery and sale, on private property presumed abandoned and taken into custody" by the State pursuant to Ind. Code § 32-34-1-30 was an unconstitutional taking of private property.

25. To sustain a facial constitutional challenge to a statute, under either federal or state constitution, plaintiff bears the burden of demonstrating that there is no set of circumstances under which the statute can be constitutionally applied. *Baldwin* v. *Reagan,* 715 N.E.2d 332 (Ind. 1999). A statute under constitutional attack is "clothed with the presumption of constitutionality." *Indiana Wholesale Wine & Liquor Co., Inc.* v. *State ex rel Indiana Alcoholic Beverage Commission,* 695 N.E.2d 99, 108 (Ind. 1998); *Fleming* v. *International Pizza Supply Corp.,* 707 N.E.2d 1033, 1037 (Ind. Ct. App. 1999) (citation omitted). The party challenging the statute bears the burden of proof, and the Court should resolve all doubts as to the statute's constitutionality against him. *Boehm* v. *Town of St. John,* 675 N.E.2d 318, 321 (Ind. 1996). The Court should not hold any statutory provisions unconstitutional if there are two reasonable interpretations of the statute, one of which is constitutional and the other not. *Id.*

26. For a taking requiring just compensation to occur, the plaintiff must first have a private right in the property taken by the government for a public use. *Parella* v. *Retirement Bd. of the Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (citing *Eastern Enters,* v. *Apfel,* 524 U.S. 498 (1998)); *see United States* v. *Jim,* 409 U.S. 80, 83 (1972) (holding that where there are no property rights there can be no violation of the Fifth Amendment). Second, if the Court determines that there is a property right implicated by the enforcement of Section 30, the inquiry turns to whether the owner of the abandoned property suffered a pecuniary loss as a result of the State's retention of the increments accruing on the property. *Brown* v. *Legal Found., of Wash.,* 538 U.S. 216, 235-237 (2003). If there is one case where no net loss occurs, Section 30 is not facially unconstitutional. *See Baldwin,* 715 N.E.2d at 337.

27. The Court's analysis of the plaintiffs claims is the same under both the federal and state constitutions. There are no differences in the terms "property" or "taken" found in both constitutions, and the courts have treated these issues as identical. *B & M Coal Corporation* v. *United Mine Workers of America,* 501 N.E.2d 401,406 (Ind. 1996) (deciding, under both Article I, Section 21 and the Fifth Amendment simultaneously, that a taking had occurred).

28. Smyth's property rights in unclaimed funds are defined by the State. "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 577 (1972). The right of appropriation by the state of abandoned property has existed for centuries at common law. *Connecticut Mutual Life Ins.*

Co. v. *Moore,* 333 U.S. 541, 547 (1948). A state has the right to dispose of abandoned property within its borders as an incident of its sovereignty. *Delaware v. New York,* 507 U.S. 490, 497 (1993); *Abel* v. *United States,* 362 U.S. 217, 241 (1960); *Standard Oil Co.* v. *New Jersey,* 341 U.S. 428, 436 (1951); *Anderson Nat'l Bank v. Luckett,* 321 U.S. 233, 240 (1944); *Cunnius v. Reading Sch. Dist.,* 198 U.S. 458, 471 (1905). Since the "state law is the chief source from which property rights flow," *Ledford* v. *Sullivan,* 105 F.3d 354, 357 (7th Cir. 1997), the Court must look to the treatment of abandoned property under Indiana law to determine whether the Plaintiff has a constitutionally protected property interest.

29. The Unclaimed Property Act is the chief source of state law defining property rights in abandoned property. Under Indiana's statutory framework, if an owner abandons his property, he does not have a property interest in the income that accrues on the abandoned property after it has been transferred to the custody of the State. Ind. Code § 32-34-1-30(b).

30. The State's statutory framework is a constitutional exercise of the state's sovereign authority to define property rights in abandoned property. *Delaware,* 507 U.S. at 497.

31. The state's power to dispose of abandoned property is expressed in the principles *of bona vacantia* and escheat. The doctrine of property possessed by the state as *bona vacantia* provides that unclaimed property reverts to the state as an incident of the state's sovereignty. BLACK'S LAW DICTIONARY 177 (6th ed. 1990); *see Delaware,* 507 U.S. at 497; *Boswell v. Citronelle-Mobile Gathering Inc.,* 294 So.2d 428,432 (Ala. 1974). "States as sovereigns may take custody of or assume title to abandoned property as *bona vacantia,* a process com-

monly (though somewhat erroneously) called escheat." *Delaware,* 507 U.S. at 497. Thus, when property is abandoned or unclaimed, and considered *bona vacantia,* the state may appropriate that property. *Delaware,* 507 U.S. at 497; *Anderson Nat'l Bank,* 321 U.S. at 240; *see also Abel* v. *United States,* 362 U.S. 217, 241 (1960) (holding "[t]here can be nothing unlawful in the Government's appropriation of. . . abandoned property").

32. The sovereign's right to take possession of abandoned property is also referred to as the state's escheat power. Escheat is "a procedure with ancient origins whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears." *Texas* v. *New Jersey,* 379 U.S. 674, 675 (1965). Thus, property fairly classified as abandoned is "subject to the care and custody of the state and ultimately to escheat." *Connecticut Mut. Life Ins. Co.,* 333 U.S. at 546. Accordingly, the state may appropriate abandoned property under this doctrine. *Commonwealth of Pennsylvania* v. *Kervick,* 288 A.2d 289, 291 (N.J. 1972) (noting New Jersey's "sovereign power to appropriate abandoned personal property by the adoption of an absolute escheat law"). The appellate court of Texas further elaborated that, "[b]ased on the power of a state to take charge of apparently unclaimed or abandoned property, escheat statutes function to transfer possession of property interests from the current holder to the State after the property has remained unclaimed or abandoned for a certain period of time." *Texas Workers' Compensation Comm'n* v. *Texas Municipal League Intergovernmental Risk Pool,* 38 S.W.3d 591, 597 (Tex. App. 2000), affirmed, 74 S.W.3d 377 (Tex. 2002).

33. Over the years, the doctrine of property possessed by the state as *bona vacantia* has merged with the principle of escheat. *See Anderson Nat'l Bank,* 321 U.S. at 240;

Boswell, 294 So. 2d at 432; *In reLindquist's Estate,* 154 P.2d 879, 882 (Cal. 1944). "Eventually, all of the states enacted statutory provisions that made no distinction between escheat and *bona vacantia." see Massachusetts* v. *FDIC,* 102 F.3d 615, 617 n.2 (1^{st} Cir. 1996) (noting that "[a]ll 50 states have statutes providing for such 'escheat'"). Under these merged principles of escheat and *bona vacantia,* states as sovereigns have the intrinsic power to assume title to abandoned property. *Delaware,* 507 U.S. at 497-98.

34. The power of the State to take the entire abandoned property includes the lesser power to retain only the increments accruing on the property while it is the State's custody. The right to dispose of abandoned property includes the right to take title to the property, whether that process is called "escheat" or *"bona vacantia."* Indiana has chosen not to claim the entire amount of abandoned property even though that is within its sovereign right. The right to claim less than all of the abandoned property must be included in the right to assert power over the abandoned property in its entirety. Therefore, the Unclaimed Property Act is nothing more than the exercise of the State's undisputable right to control the disposition of abandoned property.

35. The Court concludes that the Unclaimed Property Act represents a valid exercise of the State's police power to define the rights in abandoned property or otherwise allocate the rights to that property. The notion that the State holds the property, in part, for its own benefit is consistent with the policies underscoring escheat and *bona vacantia.* The State is in the best position to dispose of abandoned property within its borders. Additionally, there is a strong policy against letting property lay unused, and the State's disposition of that

property allays those concerns. Furthermore,-should there be any windfall as the result of the property being unclaimed or abandoned, the State is the best recipient because it may then use that windfall for the public benefit. *Louisiana Serv. & Indem. Co. v. Tarver*, 635 So. 2d 1090, 1092 (La. 1994). 'The state may more properly be custodian and beneficiary of abandoned property than any person." *Connecticut Mut. Life Ins.*, 333 U.S. at 546.

C. The State has the authority to retain interest payments earned on abandoned property after taking possession.

36. The State, as an incident of its sovereignty, has the power to fix rights in abandoned property. In enacting the Unclaimed Property Act, the General Assembly did not redefine any existing property rights. Instead, the statute is are ffirmation of the State's traditional power to appropriate abandoned property or otherwise dispose of that property. Thus, Smyth cannot establish that there is a private property right at stake in this case.

37. In exercising its sovereign power to define abandoned property rights, the General Assembly did not include interest within the definition of unclaimed property. Ind. Code § 32-34-1-30(b). Under Indiana law, interest will not be paid by the State unless it is expressly authorized by statute. The State is generally "not liable for interest on payments due unless it binds itself by contract or statute to pay interest." *Indiana Dep't of Public Welfare* v. *Chair Lance Service, Inc.*, 523 N.E.2d 1373, 1379 (Ind. 1988), citing *Carr v. State*, 127 Ind. 204 (1981). Because the State has not placed itself in a position of liability, expressly or by reasonable construction of a contract or a statute, it is not liable for interest in *any case. Lake County* v. *State ex rel. Manich*, 631

N.E.2d 529, 538 (Ind. Ct. App. 1994); *see also State* v. *Bailey,* 45 N.E.2d 38 (Ind. Ct. App. 1980) (statute authorizing State Board Tax Commissioners to order refund of inheritance tax without interest did not deprive estate of property without just compensation in violation of Indiana and Federal Constitutions).

38. The general law of Indiana is in line with other states in holding that interest will not be paid by the state unless it is expressly authorized by statute. See, e.g., *De Soye* v. *Kaplan,* 23 A.D.2d 560, 256 N.Y.S.2d 445 (1965) (New York); *General Electric Co.* v. *DeCourcy,* 397 N.E.2d. 397 (Ohio 1979). In this case, interest is absolutely barred by the statute. Ind. Code § 32-34-1-30(b). Thus, Smyth's complaint fails to state a claim upon which relief can be granted because his claim to interest, dividends, and increments accrued on unclaimed property is unsupported by a contract or statute.

39. Furthermore, while interest generally follows principal, this general rule does not hold true in all cases. Interest may be separated from the principal where there is a basis in traditional property law for doing so. *Phillips* v. *Washington Legal Foundation,* 524 U.S. 156,167-68 (1998) (holding that "background principles of property law" may provide authority for the separation of interest from principal in certain cases). Where there is no common law right to particular property, the interest and other increments accruing on that property may be retained by the State. *Washlefske* v. *Winston,* 234 F.3d 179,185-86 (4th Cir. 2000).

40. A person who abandons his property does not have a common law right to that abandoned property; rather, the abandoned property is subject to appropriation or other disposition by the State, and the State may return all, none or part of the abandoned property. *Gorny* v. *Trustees of Milwaukee County Orphans Bd.,* 93 F.2d

107,109-10 (7th Cir. 1937).

41. Therefore, background principles of property law authorize the separation of interest from principal as provided by Section 30 of the Unclaimed Property Act.

42. Smyth abandoned the property and therefore has no traditional property interest in the abandoned property. Under the traditional rules of property law, the State has the plenary power to dispose of property abandoned within its borders, *Delaware,* 507 U.S. at 497; *Standard Oil Co.,* 341 U.S. at 436, and may elect to appropriate all or part of that property. The State is free to define property rights in such a manner that the interest is separated from the principal, and the general interest-follows-principal maxim has no application.

43. The Court concludes that Smyth has no private property right to the interest and other increments that accrue on abandoned property in the State's custody because such right did not exist under traditional Indiana property law and the Unclaimed Property Act does not provide such a right.

D. Plaintiff has suffered no pecuniary loss.

44. If a party has a private property right at stake, the party's entitlement to just compensation "must be measured by his net losses." *Brown,* 123 S. Ct. at 1419-20. Where there is no pecuniary loss, there is no violation of the Takings Clause. *Id.* at 1421.

45. *Brown* mandates the rejection of Smyth's facial constitutional challenges. The Unclaimed Property Act is consistent with *Brown* in that it operates so as to provide for the accumulation of interest on certain property that would not otherwise earn interest. Under the Unclaimed Property Act, interest will accrue on the

proceeds from the sale of abandoned tangible personal property. Absent the intervention of the statute, however, the owner of these tangible items would not have received any interest.

46. The instant case is the same situation as *Brown*. People who abandon tangible personal property do not suffer any net loss under the Unclaimed Property Act. The Court must therefore conclude that that Smyth has suffered no pecuniary loss and his Takings claim must consequently fail.

E. The Legislature directed the Attorney General to avoid taking a loss on abandoned property if possible.

47. Smyth alleges that he should have received the value of the security on the date it was delivered to the Attorney General, regardless of when it was sold. (Complaint, ¶21).

48. Ind. Code § 32-34-1-31(b):

> (b) If the property is of a type that is customarily sold on a recognized market or that is subject to widely distributed standard price quotations, and if, in the opinion of the attorney general, the probable cost of a public sale to the highest bidder would:
>
> (1) exceed the value of the property; or
>
> (2) result in a net loss;
>
> the attorney general may sell the property privately, without notice by publication, at or above the prevailing price for the property at the time of the sale.

49. Ind. Code § 32-34-1-3 l(c) states:

> [securities shall be sold as soon as reasonably possible following receipt. If a valid claim is made for any securities in the possession of the attorney general, the attorney general may: (1) transfer the securities to the claimant; or (2) pay the claimant the value of the securities as of the date the securities were delivered to the attorney general.

50. Ind. Code § 32-34-1-31 (e) states:

> "[a] person does not have a claim against the attorney general for any appreciation of property after the property is delivered to the attorney general, except in a case of intentional misconduct or malfeasance by the attorney general." Ind. Code § 32-34-1-3 l (e).

51.Ind. Code §32-34-l-31(b):

> (b) If the property is of a type that is customarily sold on a recognized market or that is subject to widely distributed standard price quotations, and if, in the opinion of the attorney general, the probable cost of a public sale to the highest bidder would:
>
> (1) exceed the value of the property; or
>
> (2) result in a net loss;
>
> the attorney general may sell the property privately, without notice by publication, at or above the prevailing price for the property at the time of the sale.

52. When interpreting a statute, "the foremost objective is to determine and effect legislative intent" *JKB, Sr.* v. *Armour Pharmaceutical Co.*, 660 N.E.2d 602, 605 (Ind. Ct. App. 1996), *trans. denied.* In that case, the Indiana Court of Appeals stated that:

> [statutes must be construed to give effect to legislative intent, and courts must give deference to such intent whenever possible.(citation omitted) Thus, courts must consider the goals of the statute and the reasons and policy underlying the statute's enactment. Courts are to examine and interpret a statute as a whole, giving words their common and ordinary meaning, and *not* overemphasize a strict, literal, or selective reading of individual words. Words and phrases are taken in their plain, ordinary, and usual meaning *unless a different purpose is manifested by the statute.*

Id. (emphasis added).

53. The intention of the legislature is to be ascertained not only from the phraseology of the statute, but also by considering its nature and design, and the consequences which flow from the reasonable alternative interpretations of the statute. *Clark v. Kenley,* 646 N.E.2d 76, 78 (Ind. Ct App. 1995), *trans. denied.* The statute should be construed so as to ascertain and give effect to the intentions of the legislature expressed in the statute. *City of Indianapolis* v. *Evans,* 216 Ind. 555, 24 N.E.2d 776 (1940). Ind. Code § 32-34-1-31, then, must be read in context with other provisions of the statute and this Court must consider the intent of the General Assembly and give deference to such intent whenever possible.

54. Ind. Code § 32-34-1-31 (e) operates to bar any potential claims by only providing two instances in which plain-

tiffs may seek relief under the statute.

55. Because Smyth did not allege "malfeasance" or "intentional misconduct" by the Attorney General in his Complaint, he is barred from alleging that the State had violated this Ind. Code § 32-34-1-31 (e).

56. Furthermore, Ind. Code § 32-34-1-31 (b) manifests a clear intent by the Legislature that the Unclaimed Property Act not be a drain on the financial resources of the State by allowing discretion in the sale of abandoned properties to avoid taking a loss.

57. Because of this clear manifestation of legislative intent, Smyth's claim that the Attorney General should pay him the value of the abandoned stock in Topps, Inc. as of the date it was turned over to the Attorney General, rather than as of the date it was sold, at which time the value was lower, must be denied.

F. Injunctive relief is not appropriate for a takings action.

58. Smyth cannot enjoin the taking itself because a state action subject to the Takings Clause is always a legal state action. Smyth is asking this Court to "enter a temporary, preliminary and/or permanent order for appropriate equitable and injunctive relief to ensure the return of Smyth's and the Class's private property and [to] enjoin Defendants from pursuing illegal policies, acts and practices complained herein . . . ." (Complaint, ¶ 50)

59. The Takings Clause does not operate to prohibit government from taking private property. Rather, the Takings Clause operates as a condition, permitting the Government to take private property so long as the owner is compensated. As the United Supreme Court explained, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the

exercise of that power. . . it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Church* v. *County of Los Angeles,* 482 U.S. 304, 314-15, 107 S. Ct. 2378, 2385-86 (1987).

60. The Fifth Amendment can only be violated when the state fails to comply with the *condition* -just compensation - not when the state takes the property.

61. Injunctive relief is not available in takings cases. *Ruckelshaus* v. *Monsanto,* 467 U.S. 986,1016 (1984). In takings cases, where the government burdens or confiscates real or tangible property, injunctive relief is unavailable to prevent a future alleged unconstitutional taking. *Id.*

62. The taking itself by the government is always presupposed to be lawful. If the taking is considered unlawful, it is a deprivation of property *without due process of law,* not a taking. A takings claim is not ripe until the state refuses to pay just compensation. An alleged taking cannot be enjoined under the Takings Clause because it is not the taking that is prohibited, but rather the lack of just compensation.

63. Smyth's request for injunctive relief cannot stand because it is impossible to properly apply the Takings Clause to takings of money. As its name suggests, just compensation is, like ordinary money damages, a compensatory remedy. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 710, 119 S.Ct. 1624,1639(1999).

64. The United States Supreme Court has explained the difference between a compensatory remedy and injunctive relief follows: the distinction between an action at

law for damages - which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation - and an equitable action for specific relief- which may include an order providing for the reinstatement of an employee with back pay, or for the recovery of specific property or monies, ejectment from land, or injunction. *Bowen* v. *Massachusetts,* 487 U.S. 879, 893, 108 S.Ct. 2722,2732 (1987) (citing *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 688, 69 S.Ct. 1457, 1460 (1949).

65. As applied to this case, Smyth's request for injunction cannot stand because he has not stated a claim under the Takings Clause because he seeks a specific remedy rather than a compensatory remedy. Smyth is not seeking an injunction to get just compensation, but instead, he is seeking a declaration that the taking itself is invalid. His claim is then, a due process claim, not a takings claim since he is seeking an injunctive relief to prevent the State from retaining accruals earned on unclaimed property.

66. The Court concludes Smyth has failed to state a claim under the Takings Clause and must dismiss the complaint for a failure to state a claim for which a relief could be granted.

G. Smyth's claim is barred by his failure to file a notice of tort claim

67. Indiana Code § 34-13-3-6 provides that an action in tort is barred unless the plaintiff files a notice of tort claim with the agency or the Office of the Attorney General within 270 days after the loss occurs. Where a plaintiff sues a governmental entity after failing to file a notice of tort claim, judgment must be entered against him or her. *Lake County Juvenile Court* v. *Swanson,* 671 N.E.2d 429,438-39 (Ind. Ct. App. 1996). Nor can plaintiff allege that the State "converted" his property. In

Indiana, it is a jurisdictional requirement that a plaintiff file a Notice of Tort Claim before bringing suit for tort against this state. *Lake County Juvenile Court,* 671 N.E.2d at 437.

68. Smyth cannot base his claim for damages is upon state tort liability because he failed to file a notice of tort claim.

69. Because Smyth did not file a notice of tort claim, judgment must be entered against Smyth.

Dismissal Is Appropriate

In light of the legal insufficiency of all of Plaintiff s claims, Plaintiff is incapable of succeeding under any set of facts, and his Complaint must be dismissed for failure to state a claim on which relief can be granted.

ORDER

IT IS THEREFORE ORDERED that, based upon the foregoing Findings of Fact and Conclusions of Law, the motion to dismiss this case pursuant to Trial Rule 12(B)6 is hereby Granted.

This case is dismissed with prejudice.

Dated: 4/6/05

/s/ Judge, Marion Circuit Court

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Court of Appeals of Indiana

Corbin SMYTH,
Appellant-Plaintiff,

v.

Stephen CARTER, Attorney General of the State of Indiana; Indiana Department of the Attorney General; Tim Berry, Treasurer of the State of Indiana; and, the Indiana Department of the Treasury,
Appellees-Defendants.

No. 49A04-0504-CV-235.

April 12,2006. Transfer Denied Aug 24, 2006.

OPINION

HOFFMAN, Senior Judge.

STATEMENT OF THE CASE

Plaintiff-Appellant Corbin Smyth ("Smyth") appeals the trial court's dismissal of his complaint against Defendants-Appellees Stephen Carter, Attorney General of the State of Indiana; Indiana Department of the Attorney General; Tim Berry, Treasurer of the State of Indiana; and the Indiana Department of the Treasury (collectively, "the State").

We affirm.

STATEMENT OF THE ISSUES

The following issues are dispositive:

I. Whether the trial court properly dismissed Smyth's claim that the State's retention of interest pursuant to the Indiana Unclaimed Property Act constitutes an unconstitutional taking of private property without just compensation in violation of Article I, § 21 of the Indiana Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether the trial court properly dismissed Smyth's claim that ***221** Indiana Unclaimed Property Act requires the State to pay him the value of his stock on the date the stock was delivered to the Attorney General.

FACTS AND PROCEDURAL HISTORY

The facts, as alleged in Smyth's complaint, are as follows. On December 11, 2001, pursuant to the Indiana Unclaimed Property Act ("the Act"), the State took custody of Smyth's Topps, Inc. stock and certain dividends that had been deemed abandoned. On the date of the transfer, the Topps stock had a value of $485.20, and on January 30, 2002, the State sold the stock for $396.79.

In December of 2003, Smyth made a claim for the Topps stock and any accruements. Upon approval of the claim, the State sent Smyth the amount of the sale proceeds, $396.79, plus the dividends that had been earned but not paid before the State took custody, for a total of $406.34. The State retained the interest that had accrued after the liquidation of the Topps stock.

On March 22, 2004, Smyth filed a complaint in which he alleged that the State took his private property without compensation in violation of Art. I, § 21 of the Indiana Constitution and the Fifth and Fourteenth Amendments to the United States Constitution when, following the dictates of the Act, it did not remit the interest accrued after the sale of the Topps stock. Smyth also alleged that the State erred when it remitted to him the proceeds from the sale of the Topps stock rather than the amount representing the value of the stock on the date it was delivered into the State's custody. Smyth filed his action on his own behalf and on behalf of a class of all persons or entities whose property had been taken without just compensation.

Smyth sought a declaration that Ind.Code § 32-34-1-30(b) is unconstitutional, a subsection of the Act which states that an owner is not entitled to receive dividends, interest, or other increments accruing after delivery of property to the attorney general. Smyth also sought injunctive relief to prevent further enforcement of the statute insofar as it denies compensation for a taking. In addition, Smyth sought an accounting to determine the persons and entities to whom the State failed to remit earnings and/or the value of their securities on the delivery date.

The trial court dismissed Smyth's complaint in its entirety, and Smyth now appeals.

DISCUSSION AND DECISION STANDARD OF REVIEW

[Because this is an appeal from the trial court's grant of the State's motion to dismiss for failure to state a claim, this Court's review is *de novo*. *See Randolph* v. *Methodist Hospitals, Inc.*, 793 N.E.2d 231, 234 (Ind.Ct.App.2003), *trans. denied.* This Court "need not defer at all to the [trial court's] decision because deciding a motion to dismiss based on failure to state a claim involves a pure question of law." *Id.* Thus, the trial court's dismissal should be affirmed only if this Court finds the complaint states a set of facts that could never support the relief requested. *Id.* This Court "will not assess the sufficiency of facts supporting the complaint, but determines if the complaint states any allegation upon which the trial court could grant relief." *Meuty v. Eagle-Union Community School Corp.*, 714 N.E.2d 233, 238 (Ind.Ct.App.1999), *trans. denied* (quoting *McDonald v. Smart Professional Photo*, 664 N.E.2d 761 (Ind.Ct.App. 1996)).

***222 I.**

The right of the Sovereign to take possession of certain types of property is well established. It has long been recognized that when an owner leaves behind personal property with the specific intent to terminate ownership, or when an owner ceases all efforts to seek and reclaim lost property, the law considers that property abandoned. K. Reed Mayo, *Virginia's Acquisition of Unclaimed and Abandoned Property*, 27 Wm. & Mary L.Rev. 409, 411 (1986). Under the English common law doctrine known as *bona vacantia*, rights to certain types of personal property traditionally passed to the sovereign. *Id.*

The largest category of personalty considered *bona vacantia* was goods left when a person died intestate without heirs. *Id.* The doctrine also applied to personal property held in a failed trust, personal property held in the name of a dissolved corporation, and some forms of abandoned personal property such as wrecks, treasure troves, waifs, and estrays. *Id.* at 411-12. Under the doctrine, all of these types of property escheated to the Crown. *Id.* at 412. Many American states adopted the common law of England, and in doing so, they implicitly adopted the *bona vacantia* doctrine. *Id.* Eventually, the historical doctrines of *bona vacantia* and escheat (reversion of real property to the State) were combined under the heading of "escheat." *Delaware* v. *New York,* 507 U.S. 490, 497, 113 S.Ct. 1550, 1555, 123 L.Ed.2d 211 (1993). For purposes of this opinion, "escheat" refers to the process by which a State takes title to both real and personal property.

Unclaimed property laws, such as Indiana's Act, do not operate as a true escheat because the States take possession of, but not title to, property received from the holder. The passing of possession of property from the holder to the State under unclaimed property acts is generally referred to as a "custodial escheat." *See e.g., Fong v. Westly,* 117 Cal.App.4th 841, 12 Cal.Rptr.3d 76, 77 (2004), *rev. denied.*

Unclaimed property acts are designed to serve the dual purposes of reuniting owners with the value of unclaimed property and giving the state, rather than the holder, the benefit of the use of the unclaimed property pending reclamation by the owner. *See e.g., Texas Municipal League Intergovernmental Risk Pool* v. *Texas Workers' Compensation Commission, 74* S.W.3d 377, 382 (Tex.2002). Such acts serve a public purpose by raising revenue to benefit all citizens of the state. *See Commonwealth* v.

Vega, 174 F.3d 870, 872 (7th Cir.1999), *cert., denied,* 528 U.S. 873, 120 S.Ct. 176, 145 L.Ed.2d 149 (1999); *Louisiana Health Service and Indemnity Co.* v. *Tarver*, 635 So.2d 1090, 1092 (La. 1994).

Under Indiana's Act, the State takes custody of unclaimed property if it is presumed abandoned. ind.Code § 32-34-1-21. Under the Act, personal property is presumed abandoned if the owner has not shown any interest in the property for a statutorily prescribed period of time. Ind.Code § 32-34-1-20(c). Once the property is presumed abandoned by the operation of the Act, an entity holding the property must report the property to the Attorney General and provide certain information. Ind.Code § 32-34-1-26. Before filing its report, the holder must send written notice to the owner of the property of such action if the holder possesses the owner's correct address and if the value of the property is at least fifty dollars. Ind.Code § 32-34-1 -26(e).

After receiving the property from the holder, the Attorney General must publish notice not later than November 30th of the year immediately following the year in ***223** which the unclaimed property was remitted. Ind.Code § 32-34-l-28(a). The Attorney General must publish the notice at least once each week for two successive weeks in a newspaper in the county of the owner's last known address, or, if there is no last known address or the address is out-of-state, the publication may be made in the county where the holder has his principal place of business or any other county that the Attorney General reasonably selects. Ind.Code § 32-34-1-28(b) and (c). The notice must provide, among other things, information about the unclaimed property, and it must state that return to owner will occur upon request. Ind.Code § 32-34-l-28(d)(4).

The Act states that an owner is entitled to receive dividends, interest, or other increments realized or accruing on the unclaimed property at or before delivery to the Attorney General. Ind.Code § 32-34-1-30(a). The Act further provides that "the owner is not entitled to receive dividends, interest, or other increments accruing after delivery of the property to the attorney general . . .." Ind.Code § 32-34-1-30(b).

Smyth contends that the State's retention of the interest accrued after the sale of his stock violates both the federal and state constitutions.[1] Smyth's contention is premised on his belief that the State's possession of property under the Act is "purely" custodial. Appellant's Brief at 4. His contention is further premised on the common law maxim that "interest follows principal."

While it is true that the Act is not a true escheat act, it is also true that it is not purely custodial in nature. The chief incidents of ownership of property are the rights of possession, of use and enjoyment, and of disposition. *Rhoades* v. *State,* 224 Ind. 569, 70 N.E.2d 27, 29 (1946); *Indiana Waste Systems of Indiana, Inc.* v. *Indiana Department of State Revenue,* 633 N.E.2d 359, 367 (Ind.Tax 1994). Under the Act, however, an owner's failure to exercise his or her right of possession results in a presumption that the property has been abandoned. Once the property has been presumed abandoned and has been remitted to the State by the holder, the State then may, contrary to the owner's right of disposition, sell the property. A state's exercise of this incident may have significant consequences. *See Fong,* 12 Cal.Rptr.3d at 79-80 (sale of stock for $7,000 per share by the State that was allegedly worth approximately $70,000 per share). The forfeiture of interest and dividends pursuant to the Act also results from the owner's failure to assert his or her property rights and is a further indication that the Act is not purely custodial. Thus, Smyth's reliance on the custodial nature of the Act is misplaced.

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[1] The Fifth Amendment to the United States Constitution reads "nor shall private property be taken for public use, without just compensation," while Article I, Section 21 of the Indiana Constitution states that "no person's property shall be taken by law, without just compensation." Our supreme court has held that analysis is the same under both constitutions. *B & M Coal Corp. v. United Mine Workers of America,* 501 N.E.2d 401 (Ind.1986), *cert, denied,* 481 U.S. 1050, 107 S.Ct. 2183, 95 L.Ed.2d 839 (1987).

Indiana has recognized the common law maxim that "interest follows principal." Indeed, our supreme court held that this maxim applied to interest earned on lawyers' trust accounts containing funds of the lawyers' clients. *Matter of Indiana State Bar Association's Petition to Authorize a Program Governing Interest on Lawyers' Trust Accounts,* 550 N.E.2d 311, 312 (Ind. 1990). However, as explained below, the maxim does not apply where an owner's actions cause the loss of rights of ownership.

***224** In *Texaco, Inc. v. Short,* 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), the Supreme Court evaluated the propriety of Indiana's Dormant Mineral Interests Act, which provided that a severed mineral interest not used for a period of twenty years automatically lapses and reverts to the current surface owner of the property. In determining that the owner was not entitled to compensation under the Fourteenth Amendment, the Court held that it had "never required the State to compensate the owner for the consequences of his own neglect." 102 S.Ct. at 792. The Court further stated that "[i]t is the owner's failure to make any use of the property-and not the action of the State-that causes the lapse of the property right; there is no 'taking' that requires compensation." *Id.*

The Act conditions the retention of full property rights upon the owner's exercise of such rights. Failure to exercise those rights results in a presumption of abandonment and a custodial escheat that deprives the owner of some of the incidents of ownership. Because it is the owner's failure to act, and not the State's exercise of its sovereign power, that causes the deprivation, there is no "taking" that requires compensation.

II.

Smyth contends that the State ignored the unambiguous language of Ind.Code § 32-34-1-3l(c) in giving him the value of his Topps stock on the date it was sold instead of the greater value of the stock on the date it was delivered to the Attorney General. Ind.Code § 32-34-1-3 l(c) states in relevant part:

> Securities shall be sold as soon as reasonably possible following receipt. If a valid claim is made for any securities in the possession of the attorney general, the attorney general may:
>
> (1) transfer the securities to the claimant; or
>
> (2) pay the claimant the value of the securities as of the date the securities were delivered to the attorney general.

When interpreting a statute, we consider the express language of the statute and, if necessary, the rules of statutory construction. *KPMG, Peat Marwick, LLP* v. *Carmel Financial Corp.*, 784 N.E.2d 1057, 1060 (Ind.App.2003). Our objective when construing the meaning of a statute is to ascertain and give effect to the legislative intent. *Id.* In so doing, we must be mindful of the purpose of the statute, as well as the effect of such an interpretation. *Id.* However, we may not construe a statute that is clear and unambiguous on its face. *Id.* Rather, the words of the statute are to be given their plain, ordinary and usual meaning unless a contrary purpose is clearly shown by the statute itself. *Id.* A statute is ambiguous only if it is susceptible to more than one reasonable and intelligible interpretation. *Medical Assurance of Indiana* v. *McCarty,* 808 N.E.2d 737, 741 (Ind.Ct.App.2004).

The only way to arrive at Smyth's interpretation of Ind.Code § 32-34-1-3 l(c) is to ignore the statute's plain language. The statute clearly refers to the payment of a valid claim that is made for any securities *in the possession of the attorney general.* Smyth made his claim for the Topps stock some two years after it was sold. Thus, at the time the claim was made, the securities were not in the possession of the Attorney General, and the statute does apply. Smyth's claim is made pursuant to Ind.Code § 32-34-1-36(c), which provides that the State shall pay "the net proceeds of the sale of the property *if the property has been sold by the attorney general,* together with any additional amount to which the claimant may ***225** be entitled under section 30 of this chapter." (Emphasis added).

In summary, the retention of interest by the State pursuant to Ind.Code 32-34-1-29 does not constitute an unconstitutional taking. Furthermore, the payment of the net proceeds of the sale of the Topps stock was proper under the Act. The trial court did not err in dismissing Smyth's complaint.

Affirmed.

SHARPNACK, J., and FRIEDLANDER, J., concur

CLERK

SUPREME COURT, COURT OF APPEALS, AND TAX COURT

STATE OF INDIANA

217 STATE HOUSE, INDIANAPOLIS, IN 46204

Kevin S. Smith Clerk

RODNEY TAYLOR
1219 NORTH DELAWARE ST.
P.O. BOX 2850
INDIANAPOLIS, IN 46206-2850

Cause Number

49A04-0504-CV-00235 Lower Court Number: 49C010406CT1945

SMYTH, CORBIN -V- CARTER, STEPHEN, ET AL

You are hereby notified that the SUPREME COURT has on this day 8/24/06

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN

CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR.

WITNESS my name and the seal of said Court,

/s/Clerk, Supreme Court. Court of Appeals and Tax Court

this 24TH day of AUGUST, 2006

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

Jurisdiction	Laws	Effective Date	Statutory Citation
Arizona	2000, c. 184	1-1-2001	A.R.S. § § 44-301 to 44-339.
Arkansas	1999, Act 850	3-24-1999 [FN*]	A.C.A. § § 18-28-201 to 18-28-230.
Indiana	P.L. 31-1995	7-1-1996	West's A.I.C. 32-34-1-1 to 32-34-1-52.
Kansas	1999, c. 100	1-1-2000	K.S.A. 58-3934 to 58-3980.
Louisiana	1997, Act 809	7-10-1997	LSA—R.S. 9:151 to 9:181.
Maine	1997, 1st. Sp.Sess., c. 508	7-1-1998	33 M.R.S.A. § § 1951 to 1980.
Montana	1997, c. 124	7-1-1997	MCA 70-9-801 to 70-9-829.
New Mexico	1997, c. 25	7-1-1997	NMSA 1978, § § 7-8A-1 to 7-8A-31.
North Carolina	1999, S.L.1999-460	1-1-2000	G.S. § § 116B-51 to 116B-80.
West Virginia	1997, c. 1	7-1-1997	Code, 36-8-1 to 36-8-32.

Formerly cited as IN ST 32-9-1.5-1

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-1 Nonapplicability of chapter to foreign transactions; excepted property

Sec. 1. (a) This chapter does not apply to any property held, due, and owing in a foreign country and arising out of a foreign transaction.

(b) This chapter does not apply to:

(1) stocks;

(2) dividends;

(3) capital credits;

(4) patronage refunds;

(5) utility deposits;

(6) membership fees;

(7) account balances; or

(8) book equities;

for which the owner cannot be found and that are the result of distributable savings of a rural electric membership corporation formed under IC 8-1-13, a rural telephone cooperative corporation formed under IC 8-1-17, or an agricultural cooperative association formed under IC 15-7-1.

(c) This chapter does not apply to unclaimed overpayments of utility bills that become the property of a municipality under IC 36-9-23-28.5.

(d) This chapter does not apply to deposits required by a municipally owned utility (as defined in IC 8-1-2-1).

(e) This chapter does not apply to a business to business credit memorandum or a credit balance resulting from a business to business credit memorandum.

(f) This chapter does not apply to gift certificates or gift cards.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-2

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-2 Short title

Sec. 2. This chapter may be cited as the "unclaimed property act".

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-4

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-3 "Administrator" defined

Sec. 3. As used in this chapter, "administrator" means the administrator of the unclaimed property law of another state.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-5

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-4 "Apparent owner" defined

Sec. 4. As used in this chapter, "apparent owner" means a person whose name appears on the records of a holder as the person entitled to property held, issued, or owing by the holder.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-6

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-5 "Business association" defined

Sec. 5. As used in this chapter, "business association" means the following:

(1) A corporation.

(2) A limited liability company.

(3) A joint stock company.

(4) An investment company.

(5) A partnership.

(6) A business trust.

(7) A trust company.

(8) A savings association.

(9) A savings bank.

(10) An industrial bank.

(11) A land bank.

(12) A safe deposit company.

(13) A safekeeping depository.

(14) A bank.

(15) A banking organization.

(16) A financial organization.

(17) An insurance company.

(18) A mutual fund.

(19) A credit union.

(20) A utility.

(21) A for profit or nonprofit business association consisting of two (2) or more individuals.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-7

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-6 "Domicile" defined

Sec. 6. As used in this chapter, "domicile" means the following:

(1) The state of incorporation of a corporation.

(2) The state of the principal place of business of a holder other than a corporation.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-7.5

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-7 "Financial institution" defined

Sec. 7. As used in this chapter, "financial institution" means a depository financial institution that is organized or reorganized under Indiana law, the law of another state, or United States law. The term includes any of the following:

(1) A commercial bank.

(2) A trust company.

(3) A savings bank.

(4) A savings association.

(5) A credit union.

(6) An industrial loan and investment company.

(7) Any other entity that has powers similar to the powers of an entity described in subdivisions (1) through (6).

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-8

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-8 "Holder" defined

Sec. 8. As used in this chapter, "holder" means a person obligated to deliver or pay to the owner property that is subject to this chapter.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-9

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-9 "Insurance company" defined

Sec. 9. As used in this chapter, "insurance company" means an association, a corporation, or a fraternal or mutual benefit organization, whether or not for profit, that is engaged in the business of providing insurance, including the following:

(1) Accident insurance.

(2) Burial insurance.

(3) Casualty insurance.

(4) Credit life insurance.

(5) Contract performance insurance.

(6) Dental insurance.

(7) Fidelity insurance.

(8) Fire insurance.

(9) Health insurance.

(10) Hospitalization insurance.

(11) Illness insurance.

(12) Life insurance (including endowments and annuities).

(13) Malpractice insurance.

(14) Marine insurance.

(15) Mortgage insurance.

(16) Surety insurance.

(17) Wage protection insurance.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-10

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-10 "Last known address" defined

Sec. 10. (a) As used in sections 26, 32, and 43 of this chapter, "last known address" means a description of the location of the apparent owner's residence or business sufficient for the purpose of the delivery of mail or the receipt of a communication by other means known to the holder.

(b) As used in sections 21 and 37 of this chapter, "last known address" means a description indicating that the apparent owner was located within Indiana, regardless of whether the description is sufficient to direct the delivery of mail.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-11

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-11 "Mineral" defined

Sec. 11. As used in this chapter, "mineral" means any of the following:

(1) Gas.

(2) Oil.

(3) Coal.

(4) Other gaseous, liquid, and solid hydrocarbons.

(5) Shale.

(6) Oil shale.

(7) Cement material.

(8) Sand and gravel.

(9) Road material.

(10) Building stone.

(11) Chemical substance.

(12) Gemstone.

(13) Metallic, fissionable, and nonfissionable ores.

(14) Colloidal and other clay.

(15) Steam and other geothermal resource.

(16) Any other substance defined as a mineral under Indiana law.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-12

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-12 "Mineral proceeds" defined

Sec. 12. As used in this chapter, "mineral proceeds" means proceeds currently payable and unclaimed and, upon the abandonment of those proceeds, all proceeds that would have become payable, including the following:

(1) Obligations to pay resulting from the extraction, production, or sale of minerals, including the following:

  (A) Net revenue interests.

  (B) Royalties.

  (C) Overriding royalties.

  (D) Extraction and production payments.

  (E) Joint operating agreements.

  (F) Pooling arrangements.

(2) Obligations for the acquisition and retention of a mineral lease, including the following:

  (A) Bonuses.

  (B) Delay rentals.

  (C) Shut-in royalties.

  (D) Minimum royalties.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-13

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-13 "Money order" defined

Sec. 13. (a) As used in this chapter, "money order" includes an express money order and a personal money order on which the remitter is the purchaser.

(b) The term does not include the following:

(1) A bank money order on which the remitter is the purchaser.

(2) A bank money order or any other instrument sold by a banking or financial institution if the seller has obtained the name and address of the payee.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-14

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-14 "Owner" defined

Sec. 14. (a) As used in this chapter, "owner" means:

(1) a person who has a legal or an equitable interest in property subject to this chapter; or

(2) the person's legal representative.

(b) The term includes the following:

(1) A depositor in the case of property that is a deposit.

(2) A beneficiary in the case of property that is a trust other than a deposit in trust.

(3) A creditor, claimant, or payee in the case of other property.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-15

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-15 "Person" defined

Sec. 15. As used in this chapter, "person" means an individual, a corporation, a business trust, an estate, a trust, a partnership, an association, a joint venture, a government, a governmental subdivision, agency, or instrumentality, a public corporation, a joint or common owner, or any other legal or commercial entity.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-16

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-16 "Political subdivision" defined

Sec. 16. (a) As used in section 47 of this chapter, "political subdivision" includes any Indiana municipality, county, civil township, civil incorporated city or town, public school corporation, university or college supported in part by state funds, or any other territorial subdivision of the state recognized or designated in any law, including the following:

(1) Judicial circuits.

(2) A public utility entity not privately owned.

(3) A special taxing district or entity.

(4) A public improvement district authority or entity authorized to levy taxes or assessments.

(b) The term does not include any retirement system supported entirely or in part by the state.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-17

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-17 "Property" defined

Sec. 17. (a) This section does not apply to section 24 of this chapter.

(b) As used in this chapter, "property" means an interest in intangible personal property, except an unliquidated claim, and all income or increment derived from the interest, including an interest that is referred to as or evidenced by:

(1) money, a check, a draft, a deposit, an interest, or a dividend;

(2) a credit balance, a customer overpayment, a gift certificate, a security deposit, a refund, a credit memorandum, an unpaid wage, an unused airline ticket, mineral proceeds, or an unidentified remittance;

(3) stock and other ownership interest in a business association;

(4) a bond, debenture, note, or other evidence of indebtedness;

(5) money deposited to redeem stocks, bonds, coupons, and other securities or to make distributions;

(6) an amount due and payable under the terms of an insurance policy; and

(7) an amount distributable from a trust or custodial fund established under a plan to provide:

(A) health;

(B) welfare;

(C) pension;

(D) vacation;

(E) severance;

(F) retirement;

(G) death;

(H) stock purchase;

(I) profit sharing;

(J) employee savings;

(K) supplemental unemployment insurance; or

(L) similar;

benefits.

(c) The term does not include transactions between business entities and:

(1) a motor carrier (as defined in IC 8-2.1-17-10); or

(2) a carrier (as defined in 49 U.S.C. 13102(3)).

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-18

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

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CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-18 "State" defined

Sec. 18. As used in this chapter, "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-19

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-19 "Utility" defined

Sec. 19. As used in this chapter, "utility" means a person that owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications or for the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

Current through 2006 Second Regular Session

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

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CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-20 Presumption of abandonment

Sec. 20. (a) For purposes of this section, an indication of interest in the property by the owner:

(1) does not include a communication with an owner by an agent of the holder who has not identified in writing the property to the owner; and

(2) includes the following:

(A) With respect to an account or underlying shares of stock or other interest in a business association or financial organization:

(i) the cashing of a dividend check or other instrument of payment received; or

(ii) evidence that the distribution has been received if the distribution was made by electronic or similar means.

(B) A deposit to or withdrawal from a bank account.

(C) The payment of a premium with respect to a property interest in an insurance policy.

(D) The mailing of any correspondence in writing from a financial institution to the owner, including:

(i) a statement;

(ii) a report of interest paid or credited; or

(iii) any other written advice;

relating to a demand, savings, or matured time deposit account, including a deposit account that is automatically renewable, or any other account or other property the owner has with the financial institution if the correspondence is not returned to the financial institution for nondelivery.

(E) Any activity by the owner that concerns:

(i) another demand, savings, or matured time deposit account or other account that the owner has with a financial institution, including any activity by the owner that results in an increase or decrease in the amount of any other account; or

(ii) any other relationship with the financial institution, including the payment of any amounts due on a loan;

if the mailing address for the owner contained in the financial institution's books and records is the same for both an inactive account and for a related account.

(b) The application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent the policy from maturing or terminating if the insured has died or the insured or the beneficiary of the policy otherwise has become entitled to the proceeds before the depletion of the cash surrender value of the policy by the application of those provisions.

(c) Property that is held, issued, or owed in the ordinary course of a holder's business is presumed abandoned if the owner or apparent owner has not communicated in writing with the holder concerning the property or has not otherwise given an indication of interest in the property during the following times:

(1) For traveler's checks, fifteen (15) years after issuance.

(2) For money orders, seven (7) years after issuance.

(3) For consumer credits, three (3) years after the credit becomes payable.

(4) For amounts owed by an insurer on a life or an endowment insurance policy or an annuity contract:

> (A) if the policy or contract has matured or terminated, three (3) years after the obligation to pay arose; or
>
> (B) if the policy or contract is payable upon proof of death, three (3) years after the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve is based.

(5) For property distributable by a business association in a course of dissolution, one (1) year after the property becomes distributable.

(6) For property or proceeds held by a court or a court clerk, five (5) years after the property or proceeds become distributable. The property or proceeds must be treated as unclaimed property under IC 32-34-3.

(7) For property held by a state or other government, governmental subdivision or agency, or public corporation or other public authority, one (1) year after the property becomes distributable.

(8) For compensation for personal services, one (1) year after the compensation becomes payable.

(9) For deposits and refunds held for subscribers by utilities, one (1) year after the deposits or refunds became payable.

(10) For stock, dividends, profits, distributions, interest, redemption, payments on principal, or any other sum held or owed by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holders of the business association, or other interest in a business association, three (3) years after the earlier of:

(A) the date of the last dividend, stock split, or other distribution unclaimed by the apparent owner; or

(B) the date of the second mailing of a statement of account or other notification or communication that was:

(i) returned as undeliverable; or

(ii) made after the holder discontinued mailings to the apparent owner.

(11) For property in an individual retirement account or another account or plan that is qualified for tax deferral under the Internal Revenue Code [FN1], three (3) years after the earliest of:

(A) the actual date of the distribution or attempted distribution;

(B) the distribution date as stated in the plan or trust agreement governing the plan; or

(C) the date specified in the Internal Revenue Code by which distribution must begin in order to avoid a tax penalty.

(12) For a demand, savings, or matured time deposit, including a deposit that is automatically renewable, five (5) years after maturity or five (5) years after the date of the last indication by the owner of interest in the property, whichever is earlier. Property that is automatically renewable is considered matured for purposes of this section upon the expiration of its initial period, unless the owner has consented to a renewal at or about the time of the renewal and the consent is in writing or is evidenced by a memorandum or other record on file with the holder.

(13) For property payable or distributable in the course of a demutualization, rehabilitation, or related reorganization of a mutual insurance company, five (5) years after the earlier of:

(A) the date of last contact with the policyholder; or

(B) the date the property became payable or distributable.

(14) For all other property, the earlier of five (5) years after:

(A) the owner's right to demand the property; or

(B) the obligation to pay or distribute the property;

arose.

(d) Property is payable or distributed for purposes of this chapter notwithstanding the owner's failure to make demand or present an instrument or a document otherwise required to receive payment.

[FN1] 26 U.S.C.A. § 1 se seq.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-21

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-21 Property subject to custody of state as unclaimed property

Sec. 21. Except as provided in another state statute, property located in Indiana or another state is subject to the custody of this state as unclaimed property if the property is presumed abandoned and if:

(1) the last known address of the apparent owner, as shown on the records of the holder, is in Indiana;

(2) the records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in Indiana;

(3) the records of the holder do not reflect the last known address of the apparent owner and it is established that:

(A) the last known address of the person entitled to the property is in Indiana; or

(B) the holder is a domiciliary or a government or governmental subdivision or agency of this state and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) the last known address of the apparent owner, as shown on the records of the holder, is in a state that does not provide for the escheat or custodial taking of the property and the holder is a domiciliary or a government or governmental subdivision or agency of this state;

(5) the last known address of the apparent owner, as shown on the records of the holder, is in a foreign country and the holder is a domiciliary or a government or governmental subdivision or agency of this state;

(6) the transaction out of which the property arose occurred in Indiana, the holder is a domiciliary of a state that does not provide for the escheat or custodial taking of the property, and the last known address of the apparent owner or other person entitled to the property is:

(A) unknown; or

(B) in a state that does not provide for the escheat or custodial taking of the property; or

(7) the property is a traveler's check or money order:

(A) purchased in Indiana; or

(B) for which the issuer of the traveler's check or money order has its principal place of business in Indiana and the issuer's records:

(i) do not show the state in which the instrument was purchased; or

(ii) show that the instrument was purchased in a state that does not provide for the escheat or custodial taking of the property.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-22

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-22 Dormancy charges

Sec. 22. (a) A holder may not deduct a charge from property that is presumed abandoned if the charge is imposed because the owner failed to claim the property within a specified time unless:

(1) there is a valid and enforceable written contract between the holder and the owner that allows the holder to impose the charge; and

(2) the holder regularly imposes the charge, and the charge is not regularly reversed or otherwise canceled.

(b) If a holder described in this section is a financial institution, the dormancy charges of the department of financial institutions apply.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-23

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-23 Checks, drafts, and similar instruments as prima facie evidence of obligation; burden of proof on abandonment; defenses

Sec. 23. (a) A record that a check, draft, or similar instrument was issued is prima facie evidence of an obligation.

(b) If the attorney general claims property from a holder who is also the issuer, the attorney general's burden of proof as to the existence and amount of the property and the abandonment of the property is satisfied by showing the following:

(1) That the instrument was issued.

(2) That the required period of time of abandonment has passed.

(c) For purposes of this section, the defenses of:

(1) payment;

(2) satisfaction;

(3) discharge; and

(4) want of consideration;

are affirmative defenses that must be established by the holder.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-24

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-24 Property in safe deposit box or other safekeeping depository

Sec. 24. If:

(1) tangible or intangible property that is held in a safe deposit box or any other safekeeping depository in Indiana in the ordinary course of the holder's business; or

(2) the proceeds resulting from the sale of the property described in subdivision (1) as authorized by other law;

remain unclaimed by the owner for more than five (5) years after expiration of the lease or rental period on the box or other depository, the property or proceeds are presumed abandoned.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-25

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-25 Filing of notice of voluntary dissolution of business association, banking, or financial organization

Sec. 25. Any:

(1) business association;

(2) banking organization; or

(3) financial institution;

that is organized under Indiana law or created in Indiana and that undergoes voluntary dissolution shall file a notice of the voluntary dissolution with the attorney general not later than ten (10) days after the adoption by the members or shareholders of the resolution to dissolve.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-26

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-26 Report of property presumed abandoned

Sec. 26. (a) A holder of property that is presumed abandoned and that is subject to custody as unclaimed property under this chapter shall report in writing to the attorney general concerning the property. Items of value of less than fifty dollars ($50) may be reported by the holder in the aggregate.

(b) For each item with a value of at least fifty dollars ($50), the report required under subsection (a) must be verified and must include the following:

(1) The apparent owner's:

(A) name, if known;

(B) last known address, if any; and

(C) Social Security number or taxpayer identification number, if readily ascertainable.

(2) In the case of the contents of a safe deposit box or other safekeeping depository of tangible property:

(A) a description of the property;

(B) the place where the property is held and may be inspected by the attorney general; and

(C) any amount that is owed to the holder.

(3) The date:

(A) the property became payable, demandable, or returnable; and

(B) of the last transaction with the apparent owner with respect to the property.

(4) Other information that the attorney general requires by rules adopted under IC 4-22-2 as necessary for the administration of this chapter.

(c) If:

(1) a holder of property that is presumed abandoned and that is subject to custody as unclaimed property is a successor to another person who previously held the property for the apparent owner; or

(2) the holder has changed its name while holding the property;

the holder shall file with the report required by subsection (a) the former names of the holder, if any, and the known name and address of any previous holder of the property.

(d) The attorney general shall establish filing dates for the report required by subsection (a).

(e) The holder of property that is presumed abandoned and that is subject to custody as unclaimed property under this chapter shall, not more than one hundred twenty (120) days or less than sixty (60) days before filing the report required by subsection (a), send written notice to the apparent owner of the property stating that the holder is in possession of property subject to this chapter if:

(1) the holder has a record of an address for the apparent owner that the holder's records do not show as inaccurate;

(2) the claim of the apparent owner is not barred by the statute of limitations; and

(3) the value of the property is at least fifty dollars ($50).

(f) Before the date of filing the report required by subsection (a), the holder may request the attorney general to extend the time for filing the report. The attorney general may grant the extension upon a showing of good cause. The holder, upon receipt of the extension, may make an interim payment on the amount the holder estimates will ultimately be due. The making of an interim payment under this subsection suspends the accrual of interest on the amount.

(g) The holder shall file with the report an affidavit stating that the holder has complied with this section.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-27

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-27 Payment or delivery of property to attorney general

Sec. 27. (a) Except as provided in subsections (b) and (c), on the date a report is filed under section 26 of this chapter, the holder shall pay or deliver to the attorney general the property that is described in the report as unclaimed.

(b) In the case of an automatically renewable deposit, if at the time of delivery under subsection (a) a penalty or forfeiture in the payment of interest would result from the delivery of the property, the time for delivery is extended until the earliest date upon which a penalty or forfeiture would not result.

(c) Tangible property held in a safe deposit box or other safekeeping depository may not be delivered to the attorney general until one hundred twenty (120) days after the date the report describing the property under section 26 of this chapter is filed.

(d) If the property reported to the attorney general is a security or security entitlement under IC 26-1-8.1, the attorney general may make an endorsement, instruction, or entitlement order on behalf of the apparent owner to invoke the duty of the issuer or its transfer agent or the securities intermediary to transfer or dispose of the security or the security entitlement in accordance with IC 26-1-8.1.

(e) If the holder of property reported to the attorney general is the issuer of a certificated security, the attorney general has the right to obtain a replacement certificate under IC 26-1-8.1-405, and an indemnity bond is not required.

(f) An issuer, the holder, and any transfer agent or other person acting under the instructions of and on behalf of the issuer in accordance with this section are not liable to the apparent owner and must be indemnified against the claims of any person in accordance with section 29 of this chapter.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-28

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-28 Notice of apparent owners and abandoned property

Sec. 28. (a) Except as provided in subsection (e), the attorney general shall publish a notice not later than November 30 of the year immediately following the year in which unclaimed property has been paid or delivered to the attorney general.

(b) Except as provided in subsection (c), the notice required by subsection (a) must be published at least once each week for two (2) successive weeks in a newspaper of general circulation published in the county in Indiana of the last known address of any person named in the notice.

(c) If the holder:

(1) does not report an address for the apparent owner; or

(2) reports an address outside Indiana;

the notice must be published in the county in which the holder has its principal place of business within Indiana or any other county that the attorney general may reasonably select.

(d) The advertised notice required by this section must be in a form that, in the judgment of the attorney general, will attract the attention of the apparent owner of the unclaimed property and must contain the following information:

(1) The name of each person appearing to be an owner of property that is presumed abandoned, as set forth in the report filed by the holder.

(2) The last known address or location of each person appearing to be an owner of property that is presumed abandoned, if an address or a location is set forth in the report filed by the holder.

(3) A statement explaining that the property of the owner is presumed to be abandoned and has been taken into the protective custody of the attorney general.

(4) A statement that information about the abandoned property and its return to the owner is available, upon request, from the attorney general, to a person having a legal or beneficial interest in the property.

(e) The attorney general is not required to publish the following in the notice:

(1) Any item with a value of less than one hundred dollars ($100).

(2) Information concerning a traveler's check, money order, or any similar instrument.

(3) Property reported as a result of a demutualization of an insurance company.

Current through 2006 Second Regular Session

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32-34-1-28.5 Notice of unclaimed property reported as result of demutualization of insurance companies

Sec. 28.5. (a) The attorney general shall publish a notice not later than November 30 of the year immediately following the year in which unclaimed property as a result of a demutualization of an insurance company has been paid or delivered to the attorney general.

(b) The notice required by subsection (a) must be published at least once in a newspaper of general circulation published in the county of Indiana of the last known address of any person named in the notice.

(c) If the holder does not report an address for the apparent owner, the notice must be published in the county in which the holder has its principal place of business within Indiana or any other county that the attorney general may reasonably select.

(d) The advertised notice required by this section must be in a form that, in the judgment of the attorney general, will attract the attention of the apparent owner of the unclaimed property. The advertised notice is not subject to the rate prescribed in IC 5-3-1-1. The rate may not be higher than the rate set in IC 5-3-1-1.

(e) The advertised notice must contain the following information:

(1) The name of each person appearing to be an owner of property that is presumed abandoned, as set forth in the report filed by the holder.

(2) The last known address or location of each person appearing to be an owner of property that is presumed abandoned, if an address or a location is set forth in the report filed by the holder.

(3) A statement explaining that the property of the owner is presumed to be abandoned and has been taken into protective custody of the attorney general.

(4) A statement that information about the abandoned property and its return to the owner is available, upon request, from the attorney general, to a person having a legal or beneficial interest in the property.

(f) The attorney general is not required to include any item with a value of less than one hundred dollars ($100) in the notice.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-29

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-29 Good faith payment or delivery by holder; reimbursement; reclamation of property; defense and indemnification; property removed from safekeeping depository

Sec. 29. (a) For purposes of this section, payment or delivery is made in good faith if:

(1) payment or delivery was made in a reasonable attempt to comply with this chapter;

(2) the holder was not a fiduciary in breach of trust with respect to the property and had a reasonable basis for believing, based on the facts known at the time, that the property was abandoned; and

(3) there is not a showing that the records under which the delivery was made did not meet reasonable commercial standards of practice in the industry.

(b) Upon the payment or delivery of property to the attorney general, the state assumes custody and responsibility for the safekeeping of the property. A holder who pays or delivers property to the attorney general in good faith is relieved of all liability with respect to the property after the payment and delivery.

(c) A holder who has paid money to the attorney general under this chapter may later make payment to a person who, in the opinion of the holder, appears to be entitled to the payment. The attorney general shall promptly reimburse the holder for the payment without imposing a fee or other charge if the holder files proof of payment and proof that the payee was entitled to the payment. If any reimbursement is sought for a payment made on a negotiable instrument, including a traveler's check or money order, the holder must be reimbursed upon filing proof that:

(1) the instrument was duly presented; and

(2) the payment was made to a person who appeared to be entitled to the payment.

The holder must be reimbursed for the payment made even if the payment was made to a person whose claim was barred under section 41 of this chapter.

(d) A holder who has delivered property, including a certificate of any interest in a business association, but not including money, to the attorney general under this chapter may reclaim the property without paying a fee or other charge if the property is still in the possession of the attorney general, upon filing proof that the apparent owner has claimed the property from the holder.

(e) The attorney general may accept the holder's affidavit as sufficient proof of the holder's right to recover the money and the property under this section.

(f) If the holder pays or delivers property to the attorney general in good faith and later:

(1) another person claims the property from the holder; or

(2) another state claims the money or property under that state's laws relating to escheat or abandoned or unclaimed property;

the attorney general, upon written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability on the claim.

(g) Property removed from a safe deposit box or other safekeeping depository is received by the attorney general subject to the holder's right to be reimbursed for the cost of the opening and reasonable expenses incurred in determining the current addresses of any owners for whom the last previous address contained in the holder's records appears to be inaccurate. The property is subject to any valid lien or contract providing for the holder to be reimbursed for unpaid rent or storage charges. The attorney general shall reimburse or pay the holder out of the proceeds remaining after deducting the attorney general's cost of selling the property.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-30

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-30 Dividends, interest, or other increments accruing after delivery

Sec. 30. (a) If property, other than money, is paid or delivered to the attorney general under this chapter, the owner is entitled to receive from the attorney general any dividends, interest, or other increments realized or accruing on the property at or before delivery to the attorney general.

(b) The owner is not entitled to receive dividends, interest, or other increments accruing after delivery of the property to the attorney general under this chapter unless the property was paid or delivered under section 39(b) of this chapter.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-31

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-31 Public sale of abandoned property by attorney general

Sec. 31. (a) Except as provided in subsections (b), (c), and (f), the attorney general, not later than three (3) years after the receipt of abandoned property, shall sell the property to the highest bidder at a commercially reasonable public sale that, in the judgment of the attorney general, affords the most favorable market for the property. The attorney general may decline the highest bid and reoffer the property for sale if, in the judgment of the attorney general, the bid is insufficient. If, in the judgment of the attorney general, the probable cost of the sale exceeds the value of the property, the attorney general is not required to offer the property for sale. A sale held under this section must be preceded, at least three (3) weeks before the sale, by one (1) publication of notice in a newspaper of general circulation published in the county in which the property is to be sold.

(b) If the property is of a type that is customarily sold on a recognized market or that is subject to widely distributed standard price quotations, and if, in the opinion of the attorney general, the probable cost of a public sale to the highest bidder would:

(1) exceed the value of the property; or

(2) result in a net loss;

the attorney general may sell the property privately, without notice by publication, at or above the prevailing price for the property at the time of the sale.

(c) Securities shall be sold as soon as reasonably possible following receipt. If a valid claim is made for any securities in the possession of the attorney general, the attorney general may:

(1) transfer the securities to the claimant; or

(2) pay the claimant the value of the securities as of the date the securities were delivered to the attorney general.

Notice of the sale of securities is not required. Securities listed on an established stock exchange must be sold at prices prevailing at the time of the sale on the stock exchange. Other securities may be sold over the counter at prices prevailing at the time of sale or by any other method the attorney general considers reasonable.

(d) A purchaser of property at a sale conducted by the attorney general under this chapter takes the property free of all claims of the owner or previous holder and of all persons claiming through or under them. The attorney general shall execute all documents necessary to complete the transfer of ownership.

(e) A person does not have a claim against the attorney general for any appreciation of property after the property is delivered to the attorney general, except in a case of intentional misconduct or malfeasance by the attorney general.

(f) If property is forwarded to the attorney general and the report concerning the property does not have all of the information required under section 26(b)(1) of this chapter or the total value of the property is ten dollars ($10) or less, the attorney general may immediately:

(1) sell the property and transmit the proceeds; or

(2) transfer the property;

to the state general fund.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-32

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

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32-34-1-32 Property custody fund; deposits; payment of claims

Sec. 32. (a) The property custody fund is established. Except as provided in section 31(f) of this chapter, any money received by the attorney general under section 39(b) of this chapter shall be delivered to the treasurer of state for deposit in the property custody fund. Subject to any claim of the owner allowed by the attorney general under this chapter, the money shall be held in the property custody fund for safekeeping until the date the money is presumed abandoned under sections 20 and 24 of this chapter and transferred to the abandoned property fund established by section 33 of this chapter in accordance with this section.

(b) The attorney general shall specify in the notice required by section 28 of this chapter the latest date the apparent owner may claim the property from the property custody fund. Notice must also be mailed to each person having a last known address listed in the report to the attorney general filed under section 26 of this chapter.

(c) Except as provided in subsection (d), not later than twenty-five (25) days after the date specified in the notice published under subsection (b), the treasurer of state, upon order of the attorney general, shall transfer the principal of the property to which the notice relates from property custody fund to the abandoned property fund.

(d) The attorney general may allow a claim of the apparent owner before the principal of the property in the property custody fund is transferred to the abandoned property fund under subsection (c). After the elapse of the twenty-five (25) days referred to in subsection (c), the funds are considered abandoned property instead of property received under section 39(b) of this chapter for purposes of this chapter.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-33

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-33 Abandoned custody fund; establishment; deposits and transfers of moneys

Sec. 33. (a) The abandoned property fund is established. Except as provided in subsection (b) and sections 31 and 32 of this chapter, money received by the attorney general under this chapter, including the proceeds from the sale of abandoned property under section 31 of this chapter, shall be transferred by the attorney general to the treasurer of state for deposit in the abandoned property fund.

(b) Money received under this chapter that was originally drawn from a fund under the control of a local unit of government shall be transferred to the fund from which the money was originally drawn.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-34

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-34 Abandoned property fund; payment of costs; transfer of excess to, and appropriation from, state general fund; required deposit recordkeeping; earnings on funds; interest balances

Sec. 34. (a) Except as provided in section 42(d) of this chapter, the treasurer of state shall, on order of the attorney general, pay the necessary costs of the following:

(1) Selling abandoned property.

(2) Mailing notices.

(3) Making publications required by this chapter.

(4) Paying other operating expenses and administrative expenses, including:

(A) salaries and wages reasonably incurred by the attorney general in the administration and enforcement of this chapter; and

(B) costs incurred in examining records of the holders of property and in collecting the property from the holders.

(b) If the balance of the principal of the abandoned property fund established by section 33 of this chapter exceeds five hundred thousand dollars ($500,000), the treasurer of state may, and at least once each fiscal year shall, transfer to the state general fund the balance of the principal of the abandoned property fund that exceeds five hundred thousand dollars ($500,000).

(c) If a claim is allowed or a refund is ordered under this chapter that is more than five hundred thousand dollars ($500,000), the treasurer of state shall transfer from the state general fund sufficient money to make prompt payment of the claim. There is annually appropriated to the treasurer of state from the state general fund the amount of money sufficient to implement this subsection.

(d) Before making a deposit into the abandoned property fund, the attorney general shall record the following:

(1) The name and last known address of each person appearing from the holder's reports to be entitled to the abandoned property.

(2) The name and last known address of each insured person or annuitant.

(3) The number, the name of the corporation, and the amount due concerning any policy or contract listed in the report of a life insurance company.

(e) Except as provided in subsection (f), earnings on the property custody fund and the abandoned property fund shall be credited to each fund.

(f) On July 1 of each year, the interest balance in the property custody fund established by section 32 of this chapter and the interest balance in the abandoned property fund shall be transferred to the state general fund.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-35

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-35 Custody of property custody fund and abandoned property fund; appropriations to pay claims

Sec. 35. (a) The treasurer of state shall keep safely the money in the property custody fund established by section 32 of this chapter and the abandoned property fund established by section 33 of this chapter. The money may not be transferred or assigned except as specifically authorized and directed in this chapter. At any time, upon certification of the attorney general and the treasurer of state that there is cash on deposit in either fund in excess of the cash requirements of the fund anticipated for the next succeeding semiannual fiscal period, the state board of finance may authorize the treasurer of state to invest and reinvest the money as authorized for other funds of the state by IC 5-13, including the purchase of certificates of deposit. However, an investment may not be made in a certificate of deposit with a maturity or redemption date that is more than six (6) months after the date of purchase, subscription, or deposit. Any interest or other accretions derived from investments made under this subsection become a part of the fund from which the money was invested.

(b) A sufficient amount of money from the abandoned property fund is appropriated to the treasurer of state to pay claims, costs, and expenses ordered paid from the abandoned property fund under this chapter.

(c) A sufficient amount of money from the property custody fund is annually appropriated to the treasurer of state to pay claims ordered paid from the property custody fund under this chapter.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-36

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-36 Filing of claim with attorney general

Sec. 36. (a) Except as provided in subsection (f), a person, except another state, claiming an interest in property paid or delivered to the attorney general may file a claim on a form prescribed by the attorney general and verified by the claimant. To be considered by the attorney general, the claim must meet the requirements established by the attorney general.

(b) Not later than ninety (90) days after a claim that meets the requirements established by the attorney general is filed under subsection (a), the attorney general shall:

(1) consider the claim; and

(2) give written notice to the claimant that the claim is granted or that the claim is denied in whole or in part.

(c) Not later than thirty (30) days after a claim is granted, the attorney general shall pay over or deliver to the claimant the property, or the net proceeds of the sale of property if the property has been sold by the attorney general, together with any additional amount to which the claimant may be entitled under section 30 of this chapter.

(d) A holder who pays the owner for property that has been delivered to the state and that, if claimed from the attorney general by the owner, would be subject to an increment under section 30 of this chapter shall recover the amount of the increment from the attorney general.

(e) A person may file a claim under subsection (a) at any time within twenty-five (25) years after the date on which the property was first presumed abandoned under this chapter, notwithstanding the expiration of any other time specified by statute, contract, or court order during which an action or a proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property.

(f) The attorney general may pay over or deliver to the owner the property, or the net proceeds of the sale of property if the property has been sold by the attorney general, together with any additional amount to which the claimant may be entitled under section 30 of this chapter, without the owner filing a claim under subsection (a) if the attorney general identifies the owner.

Current through 2006 Second Regular Session

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-36.5 Disclaimer; sale or transfer; proceeds

Sec. 36.5. (a) An owner of property that is delivered to the attorney general may disclaim the property by filing a disclaimer of property with the attorney general in the form and manner required by the attorney general.

(b) If the property is disclaimed under subsection (a), the attorney general may immediately:

(1) sell the property and transmit the proceeds; or

(2) transfer the property;

to the state general fund.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-37

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-37 Recovery of property by another state

Sec. 37. (a) At any time within twenty-five (25) years after the date on which the property was presumed abandoned under this chapter, notwithstanding the expiration of any other time specified by statute, contract, or court order during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, another state may recover the property if any of the following subdivisions apply:

(1) All of the following apply:

(A) The property was delivered to the custody of this state because the records of the holder did not reflect the last known address of the apparent owner when the property was presumed abandoned under this chapter.

(B) The other state establishes that the last known address of the apparent owner or other person entitled to the property was in that state.

(C) Under the laws of that state the property escheated to or was subject to a claim of abandonment by that state.

(2) The property was paid or delivered to the custody of this state because the laws of the other state did not provide for the escheat or custodial taking of the property, and under the laws of that state subsequently enacted, the property has escheated to or become subject to a claim of abandonment by that state.

(3) All of the following apply:

(A) The records of the holder did not accurately identify the owner of the property.

(B) The last known address of the owner is in the other state.

(C) Under the laws of the other state, the property escheated to or was subject to a claim of abandonment by that state.

(4) The property was subject to custody by this state under section 21(7) of this chapter and, under the laws of the state of domicile of the holder, the property has escheated to or become subject to a claim of abandonment by that state.

(5) All of the following apply:

(A) The property is a sum payable on a traveler's check, money order, or similar instrument that was delivered into the custody of this state under section 21(7) of this chapter.

(B) The instrument was purchased in the other state.

(C) Under the laws of the other state, the property escheated to or is subject to a claim of abandonment by that state.

(b) A claim of another state to recover escheated or abandoned property must be presented in a form prescribed by the attorney general. The attorney general shall consider the claim and give written notice not more than ninety (90) days after the presentation of the claim to the other state that the claim is granted or denied in whole or in part. The attorney general shall allow the claim upon a determination that the other state is entitled to the abandoned property under subsection (a).

(c) The attorney general shall require another state, before recovering property under this section, to agree to indemnify this state and its officers and employees against any liability on a claim for the property.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-38.1

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-38 Action to establish claim

Sec. 38. A person who, under this chapter:

(1) has been aggrieved by a decision of the attorney general; or

(2) has filed a claim that has not been acted upon within ninety (90) days after its filing;

may maintain an original action to establish the claim in a court with jurisdiction and name the attorney general as a defendant.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-40

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-39 Authority to decline receipt of property; delivery of property before presumption of abandonment

Sec. 39. (a) The attorney general may decline to receive property reported under this chapter if the attorney general considers the property to have a value less than the expenses of the notice and the sale of the property.

(b) A holder, with the written consent of the attorney general and upon conditions and terms prescribed by the attorney general, may report and deliver property before the property is presumed abandoned. Property delivered to the attorney general under this subsection must be held in the property custody fund established under section 32 of this chapter, and the property is not presumed abandoned until the property otherwise would be presumed abandoned under this chapter.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-41

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-40 Destruction or disposition of property with no substantial commercial value; immunity

Sec. 40. (a) If the attorney general determines after an investigation that property delivered under this chapter does not have any substantial commercial value, the attorney general may destroy or otherwise dispose of the property at any time.

(b) An action or a proceeding may not be maintained against the state, an officer of the state, or the holder for or on account of any acts taken by the attorney general under this section, except for acts constituting intentional misconduct or malfeasance.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-42

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-41 Limitation of actions

Sec. 41. (a) The expiration of any time specified by contract, statute, or court order, during which:

(1) a claim for money or property can be made; or

(2) an action or a proceeding may be commenced or enforced to obtain payment of a claim for money or to recover property;

does not preclude the money or property from being presumed abandoned or affect any duty to file a report or to pay or deliver abandoned property to the attorney general as required by this chapter.

(b) An action or a proceeding may not be commenced by the attorney general to enforce the provisions of this chapter more than ten (10) years after the holder:

(1) specifically reported the property to the attorney general; or

(2) gave express notice to the attorney general of a dispute regarding the property.

In the absence of a report, the period of limitations is tolled. The period of limitations is also tolled by the filing of a false or fraudulent report.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-43

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-42 Requests for reports; examination of records regarding compliance

Sec. 42. (a) The attorney general may require a person who has not filed a report, or a person who the attorney general believes has filed an inaccurate, an incomplete, or a false report, to file a verified report in a form prescribed by the attorney general stating the following:

(1) Whether the person is holding any unclaimed property reportable or deliverable under this chapter.

(2) Describing any property not previously reported or as to which the attorney general has made inquiry.

(3) Specifically identifying and stating the amounts of property that may be in issue.

(b) The attorney general, at reasonable times and upon reasonable notice, may examine the records of a person to determine whether the person has complied with this chapter. The attorney general may conduct the examination even if the person believes the person is not in possession of any property reportable or deliverable under this chapter. When making an examination under this chapter, the attorney general may retain attorneys, appraisers, independent actuaries, independent certified public accountants, or other professionals and specialists as examiners.

(c) The attorney general may examine the records of an agent, including a dividend disbursing agent or transfer agent, of a business association that is the holder of property presumed abandoned if the attorney general has given the notice required by subsection (b) to both the business association and the agent at least ninety (90) days before the examination.

(d) If an examination of the records of a person under subsection (b) results in the disclosure of property reportable and deliverable under this chapter, the attorney general may assess the cost of the examination against the holder at the rate of two hundred dollars ($200) a day for each examiner. The cost of an examination of the records of an agent of a business association under subsection (c) may be imposed only against the business association.

(e) If a holder fails to maintain the records required under section 43 of this chapter and the available records of the holder are insufficient to permit the preparation of a report, the attorney general may require the holder to report and pay an amount that may reasonably be estimated from any available records of the holder or on the basis of any other reasonable estimating technique that the attorney general may select.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-44

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-43 Records retention

Sec. 43. (a) Except as provided in subsection (b) and subject to any rules adopted by the attorney general under IC 4-22-2, a holder required to file a report under section 26 of this chapter for any property for which the holder has the last known address of the owner shall maintain a record of the information required to be in the report for at least ten (10) years after the property becomes reportable.

(b) A business association that sells in Indiana traveler's checks, money orders, or other similar written instruments, other than third party bank checks on which the business association is directly liable, or that provides those instruments to others for sale in Indiana, shall maintain a record of outstanding instruments indicating the state and date of issue for at least three (3) years after the date the property is reportable.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-46

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-44 Interstate agreements and enforcement actions; audit reports as public records

Sec. 44. (a) The attorney general may enter into an agreement with other states to exchange information relating to unclaimed property or the possible existence of unclaimed property. The agreements may permit other states, or a person acting on behalf of a state, to examine records as authorized in section 42 of this chapter. The attorney general may, by rule, require the reporting of information needed to enable compliance with any agreements made under this section and prescribe the form.

(b) The attorney general may join with other states to seek enforcement of this chapter against a person who is or may be holding property reportable under this chapter.

(c) At the request of another state, the attorney general may commence an action on behalf of the administrator of the other state to enforce in Indiana the unclaimed property laws of the other state against a holder of property subject to escheat or a claim of abandonment by the other state, if the other state has agreed to pay expenses incurred by the attorney general in maintaining the action.

(d) The attorney general may request that the attorney general of another state or any other attorney commence an action in that state on behalf of the attorney general. The attorney general may retain another attorney to commence an action in Indiana on behalf of the attorney general. This state shall pay all expenses, including attorney's fees, in maintaining an action under this subsection. With the attorney general's approval, the expenses and attorney's fees may be paid from money received under this chapter. The attorney general may agree to pay the person bringing the action attorney's fees based in whole or in part on a percentage of the value of any property recovered in the action. Expenses or attorney's fees paid under this subsection may not be deducted from the amount that is subject to the claim by the owner under this chapter.

(e) Any documents and working papers obtained or compiled by the attorney general or the attorney general's agents, employees, or designated representatives in the course of conducting an audit under section 42 of this chapter are confidential and are not public records except:

(1) when used by the attorney general to maintain an action to collect unclaimed property or otherwise enforce this chapter;

(2) when used in joint audits conducted with or under agreements with other states, the federal government, or other governmental entities; or

(3) under subpoena or court order.

The documents and working papers may be disclosed to the abandoned property office of another state for that state's use in circumstances equivalent to those described in this subsection if the other state is bound to keep the documents and papers confidential.

(f) The attorney general's final completed audit reports are public records, available for inspection and copying under IC 5-14-3. A final report may not contain confidential documentation or working papers unless an exception under subsection (e) applies.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-47

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-45 Violations and penalties

Sec. 45. (a) Except as provided in subsection (b), a holder that fails to pay or deliver the property within the time required by this chapter shall pay to the attorney general interest for the time the holder is delinquent. Interest shall accrue under this subsection at the following rates:

(1) The annual interest rate for a period of one (1) year or less after the time required by this chapter for payment or delivery of the property is:

(A) the one (1) year Treasury Bill rate published in the Wall Street Journal or its successor on the third Tuesday of the month in which the remittance was due; plus

(B) one (1) percentage point.

(2) The interest rate for each year after the initial year to which subdivision (1) applies is:

(A) the one (1) year Treasury Bill rate published in the Wall Street Journal or its successor on the third Tuesday of the month immediately preceding the anniversary; plus

(B) one (1) percentage point.

As used in this subdivision, "anniversary" means the anniversary of the date on which the property was originally due to be paid or delivered under this chapter.

(b) The attorney general may waive the payment of interest described in subsection (a), in whole or part.

(c) A holder who fails to render any report or perform other duties required under this chapter shall pay a civil penalty of one hundred dollars ($100) for each day for the first fifteen (15) days that the report is withheld or the duty not performed. After the first fifteen (15) days, the holder shall pay a civil penalty of the greater of:

(1) one hundred dollars ($100) a day for each additional day, not to exceed five thousand dollars ($5,000); or

(2) ten percent (10%) of the value of the property at issue, not to exceed five thousand dollars ($5,000).

Upon a showing by the holder of good cause sufficient in the discretion of the attorney general to excuse the failure, the attorney general may waive the penalty in whole or in part.

(d) A holder who knowingly or intentionally fails to pay or deliver property to the attorney general as required under this chapter shall pay an additional civil penalty equal to ten percent (10%) of the value of the property that must be paid or delivered under this chapter. If the attorney general believes it is in the best interest for the administration of this chapter, the attorney general may waive the penalty in whole or in part.

(e) A holder who willfully refuses, after written demand by the attorney general, to pay or deliver property to the attorney general as required under this chapter commits a Class B misdemeanor.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-48

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-46 Fee agreement to locate, deliver, or recover owner's property

Sec. 46. (a) This subsection does not apply to an owner's agreement with an attorney to file a claim as to identified property or to contest the attorney general's denial of a claim. An agreement by an owner that:

(1) has the primary purpose of paying compensation to locate, deliver, recover, or assist in the recovery of property presumed abandoned under this chapter; and

(2) is entered into not earlier than the date the property was presumed abandoned and not later than twenty-four (24) months after the date the property is paid or delivered to the attorney general;

is void and unenforceable.

(b) An agreement by an owner that has the primary purpose of locating, delivering, recovering, or assisting in the recovery of property is valid only if:

(1) the fee or compensation agreed upon is not more than ten percent (10%) of the amount collected, unless the amount collected is fifty dollars ($50) or less;

(2) the agreement is in writing;

(3) the agreement is signed by the apparent owner;

(4) the agreement clearly sets forth:

(A) the nature and value of the property; and

(B) the value of the apparent owner's share after the fee or compensation has been deducted; and

(5) the agreement contains the provision set forth in subsection (d).

(c) This section does not prevent an owner from asserting at any time that an agreement to locate property is otherwise invalid.

(d) This subsection applies to a person who locates, delivers, recovers, or assists in the recovery of property reported under this chapter for a fee or compensation. An advertisement, a written communication, or an agreement concerning the location, delivery, recovery, or assistance in the recovery of property reported under this chapter must contain a provision stating that, by law, any contract provision requiring the payment of a fee for finding property held by the attorney general for less than twenty-four (24) months is void, and that fees are limited to not more than ten percent (10%) of the amount collected unless the amount collected is fifty dollars ($50) or less.

(e) Subsections (b)(4) and (d) do not apply to attorney's fees.

(f) If an agreement covered by this section:

(1) applies to mineral proceeds; and

(2) contains a provision to pay compensation that includes a portion of the underlying minerals or any mineral proceeds not then presumed abandoned;

the provision is void and unenforceable.

(g) An agreement covered by this section that provides for compensation that is unconscionable is unenforceable except by the owner. An owner who has agreed to pay compensation that is unconscionable, or the attorney general on behalf of the owner, may maintain an action to reduce the compensation to a conscionable amount. The court may award reasonable attorney's fees to an owner who prevails in the action.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-49

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-47 Cooperation of state and public agencies

Sec. 47. All officers, agencies, boards, bureaus, commissions, divisions, and departments of the state, including any body politic and corporate created by the state for public purposes, and every political subdivision of the state shall do the following:

(1) Cooperate with the attorney general upon the attorney general's request to further the purposes of this chapter.

(2) Make their records available to the attorney general for the purposes of discovering property that is presumed to be abandoned under this chapter.

(3) Compile from their records, upon the attorney general's request, reports that would aid the attorney general in identifying the holders of property presumed to be abandoned under this chapter and in discovering property that is presumed to be abandoned.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-50

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-48 Employment of independent consultants

Sec. 48. The attorney general may employ the services of any independent consultants and other persons possessing specialized skills or knowledge that the attorney general considers necessary or appropriate for the administration of this chapter, including consultants in the following areas:

(1) Upkeep.

(2) Management.

(3) Sale.

(4) Conveyance of property.

(5) Determination of any sources of unreported abandoned property.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-52

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-49 Duty to report, pay, or deliver property before July 1, 1996

Sec. 49. This chapter does not relieve a holder of a duty that arose before July 1, 1996, to report, pay, or deliver property. Except as provided in section 41(b) of this chapter, a holder that did not comply with the law in effect before July 1, 1996, is subject to the applicable enforcement and penalty provisions that existed and that are continued in effect for the purpose of this section.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-54

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-50 Uniformity of application and construction

Sec. 50. This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-45

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-51 Enforcement action

Sec. 51. The attorney general may maintain an action in a court of competent jurisdiction to enforce this chapter.

Current through 2006 Second Regular Session

Formerly cited as IN ST 32-9-1.5-3

WEST'S ANNOTATED INDIANA CODE

TITLE 32. PROPERTY

ARTICLE 34. LOST OR UNCLAIMED PERSONAL PROPERTY

CHAPTER 1. UNCLAIMED PROPERTY ACT

32-34-1-52 Adoption of rules

Sec. 52. The attorney general may adopt rules under IC 4-22-2 to carry out the purposes of this chapter.

Current through 2006 Second Regular Session

STATE OF INDIANA) IN THE MARION SUPERIOR COURT
) SS:
COUNTY OF MARION) CAUSE NO. 49DO60403CC000611

CORBIN SMYTH, individually and)
on behalf of all others similarly situated,)
)
Plaintiff,)
v.)
STEVE CARTER, Attorney General)
of the State)
of Indiana, OFFICE OF THE)
ATTORNEY GENERAL State of)
Indiana,)
TIM BERRY, Treasurer of the)
State of Indiana, and)
OFFICE OF THE TREASURER,)
State of Indiana,)
)
Defendants.)

COMPLAINT FOR DAMAGES AND REQUEST FOR CLASS CERTIFICATION

COMES NOW Plaintiff Corbin Smyth, individually and on behalf of all others similarly situated, and complain of Defendants Steve Carter, Attorney General of the State of Indiana, Office of the Attorney General, State of Indiana, Tim Berry, Treasurer of the State of Indiana, Office of the Treasurer, State of Indiana (collectively "Defendants") and for his complaint alleges as follows:

INTRODUCTION

1. This is an action for violation of Article I, §21 of the Constitution of the State of Indiana, as well as for violation

of the Fifth and Fourteenth Amendments to the United States Constitution. It concerns Defendants' unlawful confiscation of dividends, interest and other accruals, including the increased value of securities (collectively "earnings"), earned on private property while it is held in custody for its owners by the Defendant pursuant to the Indiana Unclaimed Property Act, LC. 32-34-1-2 *et seq.* (the "Unclaimed Property Act" or "Act"). Pursuant to the Act, private property in the possession of a person other than its owner and presumed "abandoned" under the Act must be remitted into the Defendants' custody, at which point the earnings on such private property are used to fund state programs and operations having no relation to the property or its earnings. The Defendants' failure to return the earnings thereon to the owner of the property is taking of private property without just compensation in violation of the Constitutions of the State of Indiana and the United States. In this lawsuit, Plaintiff seeks on his own behalf and on behalf of the Class defined herein a declaration that the Act, in prohibiting the return of most earnings on private property held in Defendants' custody, and Defendants' actions in conformity therewith, is unlawful. Plaintiff also seeks recovery of Plaintiff's and the Class's private property wrongfully taken, together with injunctive relief to prevent further violations of the Plaintiff's and the Class's constitutional rights and an accounting to determine the persons and/or entities to whom Defendants have failed to remit earnings on principal.

2. Plaintiff brings this action on his own behalf and on behalf of the following Class:

All persons or entities, other than members of the federal or State of Indiana judiciary, whose property has been taken into custody by the Attorney General of the State of Indiana (or his predecessors) and held in various funds by the Treasurer of the State of Indiana (or his predecessors) pursuant to the Indiana

Unclaimed Property Act (or its predecessor acts), I.C. §32-34-1-2 *et seq.*, and which has earned or will earn interest, dividends or other accruals while in the custody of the Defendants and which interest, dividends or other accruals have been or will be used for the purposes of funding state programs and operations without compensation being paid to the person or entity whose property was or will be used to earn such interest, dividends or accruals.

PARTIES

3. Plaintiff Corbin Smyth ("Smyth") is an individual and resident of Bloomington, Indiana

4. Defendant Steve Carter is the Attorney General of the State of Indiana. In that position, since January 8,2001, and pursuant to I.C. 32-34-1-33, Defendant Carter has been charged with the administration of claims made to the Abandoned Property Fund.

5. Defendant Office of the Attorney General, State of Indiana administers claims made by owners for the return of their property held pursuant to the Act and executes the Attorney General's directives relating to the Act.

6. Defendant Tim Berry is the Treasurer of the State of Indiana. In that position, since February 10, 1999, Defendant Berry, in accordance with I.C. 32-34-1-34 and 35, has been and is responsible for the care-taking of money deposited in the Abandoned Property Fund. Defendant Berry is also responsible for the deposit of excess funds into the Common School Fund and/or the state's general fund.

7. Defendant Office of the Treasurer, State of Indiana administers the directives of the Treasurer of the State of Indiana relating to the Act.

FACTS

The Unclaimed Property Act and its Operation

8. Indiana passed the Unclaimed Property Act in 1967, revised it in 1995, and revised it again in 2003. In its current version, Indiana's Unclaimed Property Act is modeled after the Uniform Unclaimed Property Act. *See* 8B Uniform Laws Annotated.

9. In essence, the Unclaimed Property Act requires private parties holding others' property for long periods of time to turn such property over to the Defendants for safe keeping, and to prevent private holders, such as banks, from collecting a windfall by reason of their holding large amounts of unclaimed property.

A. Property Presumed Abandoned

10. The Act presumes property "abandoned" if it is in the custody of a third party, and has been unclaimed for a statutorily-prescribed period, which varies between one to fifteen years, depending on the type of property at issue.

11. The Act defines property as "an interest in intangible property, except an unliquidated claim, and all income or increments derived from the interest" including, *inter alia,* money deposits, securities and amounts due and payable under an insurance policy. I.C. 32-34-1-17.

12. Property is "presumed abandoned" when a third party holder has not received any indication of interest in the property from the owner for a statutorily-prescribed period. Such indications of interest include the receipt of correspondence, activity of the owner with respect to the holder, such as payment of a loan, and other evidence of activity by the rightful owner. I.C. 32-34-1-20.

B. Delivery of Property by Holders to the Defendants for Safe Keeping

13. Once a holder determines property in its possession is "presumed abandoned" pursuant to the Act, the holder is required to deliver the property to the Attorney General. I.C. 32-34-1-27. The property is then deposited into the Property Custody Fund, and then transferred to the Abandoned Property Fund. I.C. 32-34-1-32.

14. The Treasurer is responsible for the custody and safe keeping of the money in both the Property Custody Fund and the Abandoned Property Fund. I.C. 32-34-1-35.

C. Use of Funds by the State

15. Upon receipt of tangible property from the Attorney General, the Treasurer is required to sell the property to the highest bidder at a commercially reasonable public sale. I.C. 32-34-1-31. Most property must be sold within three years of receipt, but securities must be sold as soon as reasonably possible following receipt. I.C. 32-34-1-3 l(c).

16. At all times, the Treasurer has had the ability to invest the principal in the Abandoned Property Fund, when authorized by the state board of finance. I.C. 32-34-1-35. Upon information and belief, the Treasurer has invested the Abandoned Property Fund in the past and earnings have accrued to the Abandoned Property Fund.

17. Before 2003, the Act provided that if the principal balance of the Abandoned Property Fund exceeded $500,000 the Treasurer was required to deposit the excess money into the Common School Fund at least

once a year. I.C. 32-34-1-34. Upon information and belief, the Treasurer followed the law and engaged in this practice at all times before 2003. The state board of finance was then required, with certain limited exceptions, to invest the Common School Fund. I.C. 21-1-3-1. Income derived from such investments is used by the state to fund certain public school initiatives. *Id.*

18. The Treasurer is also authorized to, and on information and belief does, pay from the Abandoned Property Fund the following:

    a. any costs incurred in connection with the selling of abandoned property;

    b. any costs of mailing and publication in connection with any abandoned property; and

    c. any costs incurred in connection with the operation and administration of the Act.

19. As of 2003, the Act was amended so that the Treasurer is-now required to transfer any principal balance exceeding $500,000 in the Abandoned Property Fund into the state general fund. House Enrolled Act 1001, (Public Law 224-2003), Section 115. Upon information and belief, the Treasurer has complied with the law and engaged in this procedure since 2003.

D. Remittance of Property to Rightful Owners

20. Rightful owners may reclaim their property that has been taken into Defendants' custody by filing a valid claim. This claim procedure is administrated by the Attorney General's office. I.C. 32-34-1-36. The Act states that an owner is entitled to receive any dividends, interest, or other increments realized or accruing on the property *at* or *before* delivery to the Attorney General. I.C. 32-34-1-30. However, the Act does not

require the payment of any earnings on property, including dividends on securities, to the owner after the property has been presumed abandoned and delivered to the Attorney General, and the Treasurer does not in fact remit to the owner any earning gained on property after it has been delivered to the Attorney General, and the Treasurer does not in fact remit to the owner any earnings gained on property after it has been delivered to the Attorney General and presumed abandoned. I.C. 32-34-1-30.

21. The Act also provides that in the case of securities delivered to the Attorney General and presumed abandoned, a claimant is to received the value of the security on the date it was delivered to the Attorney General, regardless of when it was sold. I.C. 32-34-1-31. If the Treasure sells the stock for a gain, the gain is kept in the Abandoned Property Fund and not remitted to the owner.

22. The net result of these practices is that nay interest, income, or accrual received on property "presumed abandoned" is taken for the state's use without compensation to the owner.

23. According to the Attorney General's web site, during 2002, remittance of abandoned property to the Defendants totaled over $40 million and approximately $15.6 million was paid to claimants. Currently, the Defendants hold custody to more than $198 million in principal amount of unclaimed property plus the interest and earnings on it.

RELEVANT CASE LAW

24. The terms "escheat" and "abandonment" are sometimes confused. Unlike an escheat statute, in which actual title to property may eventually vest in the state after certain

due process procedures are followed, the Unclaimed Property Act is purely custodial in nature, and title to property presumed abandoned is never transferred from the owner to the Defendants. Instead, title and ownership at all times remain with the original owner of the property.

25. Consistent with federal law, the Indiana Supreme Court has recognized the general rule that "interest follows principal", holding in *In the Matter of Indiana State Bar Association's Petition to Authorize a Program Governing Interest on Lawyer's Trust Accounts,* 550 N.E.2d 311,312 (Ind.1990), that:

> It is well established that one who owns property owns the income that his property produces. In other words, that produced by the property becomes the property of the owner. . .this principle, when applied to the production of money in the form of interest, has been expressed in a manner familiar to most lawyers: "the interest follows the principal as the shadow follows the substance."

26. Applying this principle in 548 N.E. 2d 153,159 (Ind. 1989), the Indiana Supreme Court held that customers of a utility company, which illegally increased rates to pay for an abandoned project, were entitled to interest that had accrued on their funds since they originally remitted payment to the utility. The Indiana Supreme Court noted:

> [W]here an ascertainable amount [is] owed to another, denying interest on the sum amount[s] to a double wrong by depriving the person owed of the increase to which he was justly entitled and by allowing the one holding the funds to profit from the use of the funds that did not rightly belong to him. . .Indiana law reflects this view

Northern Indiana Public Service Co., 548 N.E.2d at 159 (citation omitted).

27. The United States Supreme Court has held that retention of interest earned on private funds held by a government agency is a taking in violation of the Fifth Amendment to the United States Constitution. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 165, 66 L.Ed.2d 358,367,101 S.Ct 446,452 (1980) *("Webb's")*, the Supreme Court found unconstitutional a Florida statute which allowed a county clerk to retain interest and earned on interpleader funds, and stated:

> [A]State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

In *Webb's*, the Supreme Court held that all interest earned on the interpleader funds belonged not to the government but to the owners of the funds and must be returned to them. A copy of the *Webb's* opinion is attached hereto as Exhibit A.

28. By authorizing the Defendants to retain earnings and other accruals on abandoned property, the Unclaimed Property Act unlawfully appropriates to the state both the interest and other accruals on such private property, as well as any income on the property for the period during which such property is held.

Plaintiffs Property

29. Smyth owned forty (40) shares of Topps Inc. stock in the late 1980's. His stock and certain cash dividends were delivered to the Attorney General on December 11,2001 by

Topps Inc. Smyth's stock was valued at $485.20 on the date it was transmitted to the Attorney General. Defendants sold Smyth's property on January 30, 2002 for $396.79. Smyth made a valid claim for his property in December 2003. On January 13, 2004, the Treasurer remitted to Smyth $406.34 (totaling $396.79 from the sale of his stock on January 31, 2002 and $9.95 from cash dividends earned prior to December 11, 2001), retaining the interest and dividends earned on his property during the preceding two years.

CLASS ACTION ALLEGATIONS

30. Plaintiff brings this action as a class action pursuant to Trial Rule 23 of the Indiana Rules of Trial Procedure, MD. T.R. 23, on behalf of the Class.

31. Plaintiff is unable to determine the exact number of individuals and entities that comprise the Class since this information is solely within the possession and control of the Defendants. More than $15.6 million in claims were paid in 2002. Based on that number, and assuming the average amount of a claim was $ 1,000.00, approximately 15,600 property owners made claims in 2002. Most, if hot all Class members have claims that are too small to warrant an individual action. Thus, the Class is sufficiently numerous to make joinder of all Class members impracticable.

32. Common questions of law or fact exist, and include but are not limited to, the following:
    a. whether interest, dividends and other accruals earned on property held in custody by the Defendants is private property;
    b. whether §30 of the Act, by which Defendants retain interest, dividends and other accruals earned on private property while in Defendants custody pursuant to the Act, violates Article I, §21 of the

Indiana Constitution and/or the Fifth and Fourteenth Amendments to the United States Constitution; and

c. what constitutes a proper remedy for the taking of such private property.

Conversely, the only individual questions affecting Class members is the precise amount of each Class Members private property wrongfully withheld by Defendants. Thus, these common questions predominate over any questions affecting only individual members.

33. Plaintiff's claim is typical of those of other Class members in that his private property was remitted to Defendants pursuant to the Act, and upon return of his property he did not received the earnings which had accrued on his property while in the Defendants's possession. In addition, Plaintiff did not receive the value of his stock on the date it was delivered to the Attorney General.

34. Plaintiff and his counsel will fairly and adequately protect the interests of the Class. The interests of the Class representative are consistent with those of the Class, and he has no interests antagonistic to the Class. Plaintiff is represented by experienced and able counsel whose firms have successfully represented plaintiff classes in complex matters throughout the United States in both federal and state courts.

35. This class action is an appropriate method for the fair and efficient adjudication of the claims asserted herein. Repetitive individual litigation would pose an unnecessary burden on Class members and the court system. This class action is not expected to present any significant management difficulties and focuses, by definition, on the Defendants uniform and consistent actions. The prosecution of separate actions would create a risk of inconsistent or varying adjudication with respect to

individual members of the Class which would establish incompatible standards of conduct for the Defendants.

COUNT I

36. Plaintiff re-alleges all preceding paragraphs as if fully set forth here.

37. Article I, §21 of the Constitution of the State of Indiana provides:

> No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

38. The interest, dividends and other accruals earned on private property owned by plaintiff and the Class while in the Defendants' custody pursuant to the Act are private property.

39. By requiring the Defendants to retain dividends, interest and accruals on such private property, the Act provides a windfall to the state and places upon property owners whose private property has been taken into custody by the Defendants pursuant to the Act an unfair burden which in fairness and equity should be borne by all citizens of the state.

40. By retaining such accruals and using them for state purposes, Defendants have violated and continue to violate the prohibition against taking private property without payment of just compensation contained in Article I, §21 of the Indiana Constitution.

41. Defendants' unlawful use and retention of the earnings on Plaintiff's and the Class's private property is a taking of such property without just compensation, and so a deprivation of the Plaintiffs and the Class's rights secured under Article I, §21 of the Indiana Constitution.

COUNT II

42. Plaintiff re-alleges all preceding paragraphs as if fully set forth here.

43. The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the United States Constitution, provides in relevant part: "private property [shall not] be taken for public use, without just compensation."

44. The interest, dividends and other accruals earned on private property owned by plaintiff and the Class while in the Defendants' custody pursuant to the Act are private property.

45. By requiring the Defendants to retain dividends, interest and accruals on such private property, the Act provides a windfall to the state and places upon property owners whose private property has been taken into custody by the Defendants pursuant to the Act an unfair burden which in fairness and equity should be borne by all citizens of the state.

46. Defendants' unlawful use and retention of the earnings on Plaintiff's and the Class's private property is a taking of such property without just compensation, and so a deprivation of the Plaintiff's and the Class's rights secured under the Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Plaintiff prays that the Court:

47. Determine that Counts I and II of this action may be maintained as a class action pursuant to Rule 23 of the Indiana Rules of Trial Procedure on behalf of the Class defined herein and declare Plaintiff to be proper Class representative and his counsel to be Class counsel;

48. Declare the retention of dividends, interest and other accruals, including the difference in value of securities

between the date of delivery and sale, on private property presumed abandoned and taken into Defendants' custody pursuant to the Indiana Unclaimed Property Act, I.C. §32-34-1-2 *et seq.*, to be an unconstitutional taking of private property without just compensation in violation of Article I, §21 of the Constitution of the State of Indiana and/or the Fifth and Fourteenth Amendments to the United States Constitution;

49. Declare the failure to pay the owner of securities presumed abandoned by the Attorney General the difference in value of securities on the date they were delivered to the Attorney General and the date the securities were sold to be a taking without just compensation in violation of Article I, §21 of the Constitution of the State of Indiana and/or the Fifth and Fourteenth Amendments to the United States Constitution;

50. Enter a temporary, preliminary and/or permanent order providing for appropriate equitable and injunctive relief to ensure the return of Plaintiff's and the Class's private property and enjoining Defendants from pursuing the illegal policies, acts and practices complained of herein and providing an accounting that identifies all persons who submitted approved claims and whose property has been returned to them without payment of dividends, interest or other accruals earned on such property while in the Defendants' possession;

51. Award counsel for Plaintiff and the Class reasonable attorneys' fees, together wit reimbursement of expenses and costs of suit as allowed by law; and

52. Award such other and further relief as the Court deems just and proper.

CORBIN SMYTH, individually and on behalf of the Class

By:

/s/ Rodney V. Taylor
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STATE OF INDIANA) IN THE MARION SUPERIOR
COURT)
) SS:
COUNTY OF MARION) CAUSE NO.

CORBIN SMYTH, individually and)
on behalf of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
STEVE CARTER, Attorney General of)
the State of Indiana, OFFICE OF THE)
ATTORNEY GENERAL State of Indiana,)
TIM BERRY, Treasurer of the State of)
Indiana, and OFFICE OF THE)
TREASURER, State of Indiana,)
)
Defendants.)

REQUEST FOR JURY TRIAL

COMES NOW Plaintiff Corbin Smyth, individually and on behalf of all others similarly situated, by counsel, respectfully request trial of the above cause by a jury.

By:.________________

Randall D. Smith
CHRISTOPHER & TAYLOR
1219 North Delaware Street
P. O. Box 2850
Indianapolis, Indiana 46206

EXHIBIT A

Supreme Court of the United States

WEBB'S FABULOUS PHARMACIES, INC. et al., Appellants,

v.

Arthur H. BECKWITH, Jr., Clerk of the Circuit Court, etc.

No. 79-1033.

Argued Oct. 13,14,1980. Decided Dec. 9, 1980.

BLACKMUN, Justice.

This case presents the issue whether it is constitutional for a county to take as its own, under the authority of a state statute, the interest accruing on an interpleader fund deposited in the registry of the county court, when a fee, prescribed by another statute, is also charged for the clerk's *156 services in receiving the fund into the registry. The statute which is the object of the constitutional challenge here is Fla.Stat. § 28.33 (1977). [FN1]

> FN1. Section 28.33, enacted as 1973 Fla.Laws, ch. 73-282, § 1, reads in pertinent part:
>
> "The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. . .. Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject

> to the above guidelines. . . . *All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court* investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year." (Emphasis supplied.)

101 S.Ct. 446

66L.Ed.2d358

On February 12, 1976, appellant Eckerd's of College Park, Inc., entered into an agreement to purchase for $1,812,145.77 substantially all the assets of Webb's Fabulous Pharmacies, Inc. Both Eckerd's and Webb's are Florida corporations. At the closing, Webb's debts appeared to be greater than the purchase price. Accordingly, in order to protect itself and as permitted by the Florida Bulk Transfers Act, Fla.Stat. § 676.106(4) (1977), [FN2] Eckerd's filed a complaint of interpleader in the Circuit Court of Seminole County, Fla., interpleading *157 as defendants both Webb's and Webb's creditors (almost 200 in number) and tendering the purchase price to the court.

> FN2. Section 676.106(4), which derives from the Uniform Commercial Code, reads:
>
> "A transferee may within ten days after taking possession of the goods, discharge his obligations under this section by an action in the circuit court for the county where the transferor had his principal place of business in this state interpleading all creditors in the list of creditors required by [§] 676.104. In such event the court shall require the consideration to be deposited into the registry of the court and thereupon shall decree the goods to be free and clear of the

> claims of such creditors and that such creditors should file their claims with the court."

Pursuant to § 676.106(4), the Circuit Court thereupon ordered that the amount tendered be paid to the court's clerk and that the clerk deposit it "in an assignable interest-bearing account at the highest interest." App. 4a. The court specifically reserved decision on the issue of entitlement, as between the clerk and Webb's creditors, to the interest earned on the fund while so deposited, stating that the transfer to the clerk was without prejudice to the creditors' claims to that interest. *Id,* at 4a-5a. Eckerd's tendered the sum to the **449 clerk on July 13, 1976, *id,* at 6a, and that official proceeded to make the required investment.

The clerk deducted from the interpleader fund so deposited the sum of $9,228.74 as his fee, prescribed by Fla.Stat. § 28.24(14) (1977), [FN3] "for services rendered" for "receiving money into the registry of court." The fee, as the statute directed, was calculated upon the amount placed in the registry, that is, 1% of the first $500, and 1/2 % of the remainder.

FN3. Section 28.24, as then in force, read in pertinent part:

> "The clerk of the circuit court shall make the following charges for services rendered by his office in recording documents and instruments and in performing the duties enumerated:
>
> * * *
>
> "(14) For receiving money into the registry of court:
> "(a) First $500.00
> percent 1
> "(b) Each subsequent $100.00,
> percent ....1/2 "

The statute has since been amended in ways not relevant to the present litigation.

On July 5, 1977, almost a year after the tender and payment, the Circuit Court upon its own motion [FN4] appointed a receiver for Webb's. Among the receiver's stated duties were * 158 the determination of the number and amount of claims filed against the interpleader fund and the preparation and filing with the court of a list of those claims. App. 9a. The receiver filed a motion for an order directing the clerk to deliver the fund to him. *Id,* at 12a. The motion was granted, *id,* at 14a, and the principal of the fund, reduced by the $9,228.74 statutory fee and by $40,200 that had been paid out pursuant to court order, was paid to the receiver on July 21. The interest earned on the interpleader fund while it was held by the clerk, but which was not turned over to the receiver, then exceeded $90,000. Interest earned thereafter on the amount so retained brought the total to more than $100,000. Tr. of Oral Arg. 34. It is this aggregate interest that is the subject matter of the present litigation. Appellants make no objection to the clerk's statutory fee of $9,228.74 taken pursuant to § 28.24(14). Tr. of Oral Arg. 6; Brief for Appellants 6,9.

FN4. The appellants suggest that the court acted *sua sponte* because of the continuing insistence of the clerk and Seminole County that the county was entitled to the interest being earned on the fund, and to bring the interest period in controversy to an end. Brief for Appellants 10.

The receiver then moved that the court direct the clerk to pay the accumulated interest to the receiver. App. 22a, 26a, 33a. The Circuit Court ruled favorably to the receiver, holding that the clerk "is not entitled to any interest earned, accrued or received on monies deposited in the registry of this Court pursuant to the Court's order.

. .; the creditors herein are the rightful parties' entitled to all such interest earned on the interpleader fund while it is held by the Clerk of this Court." *Id,* at 35a.

Seminole County and the clerk appealed to the Florida District Court of Appeal. That court transferred the cause to the Supreme Court of Florida. The Supreme Court, in a *per curiam* opinion with one justice dissenting in part, ruled that § 28.33 was "constitutional" and reversed the judgment of the Circuit Court. 374 So.2d 951 (1979). The stated rationale was that a fund so deposited is "considered 'public money' " from the date of deposit until it leaves the account; that "the statute takes only what it creates"; and that "[t]here is no unconstitutional taking because interest earned on the clerk ***159** of the circuit court's registry account is not private property." *Id,* at 952-953. [FN5]

FN5. Although it is not entirely clear that the federal constitutional issue was presented to the Circuit Court, the propriety of the clerk's claim to the interest was clearly raised there as an issue under the Florida Constitution. See p. 6 of the receiver's memorandum in support of his motion for direction to the clerk to remit (p. 77 of the Original Record on Appeal). That memorandum, however, contains at least one reference to "pertinent provisions of the *Florida Constitution* and its Federal counterpart" (emphasis in original), *ibid.*, and there are "due process" arguments beginning at p. 4 of the receiver's reply memorandum. Furthermore, the Circuit Court, in granting the receiver's motion for a *nunc pro tunc* order correcting an omission from the record, specifically stated that § 28.33 and 1973 Fla.Laws, ch. 73-282, "are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the court in this case."

App. 40a-41a. In any event, the federal constitutional issue appears to have been raised in the Supreme Court of Florida. See Tr. of Oral Arg. 4. While there is no specific reference to the Federal Constitution in the court's *per curiam* opinion, the court spoke specifically of the receiver's argument that the statute "constitutes either a taking without due process of law or an unlawful tax," 374 So.2d, at 952, and ruled that there was "no unconstitutional taking." *Id.* , at 953. We are satisfied that the Supreme Court of Florida upheld the statute against both federal and state constitutional challenges. This is a sufficient base for this Court's consideration of the federal issue.

****450** Because it had been held elsewhere that a county's appropriation of the interest earned on private funds deposited in court in an interpleader action is an unconstitutional taking, *Sellers* v. *Harris County*, 483 S.W.2d 242 (Tex. 1972); see *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964), we noted probable jurisdiction. 445 U.S. 925, 100 S.Ct. 1310, 63 L.Ed.2d 757 (1980).

II

It is at once apparent that Florida's statutes would allow respondent Seminole County to exact two tolls while the interpleader fund was held by the clerk of the court. The first ***160** was the statutory fee of $9,228.74 "for services rendered," as § 28.24 recites, by the clerk's office for "receiving money into the registry of court." That fee was determined by the amount of the principal deposited.

The second would be the retention of the amount, in excess of $100,000, consisting of "[a]ll interest accruing from moneys deposited." This toll would be exacted because of § 28.33's provision that the interest "shall be deemed income of the office of the clerk of the circuit court."

An initial reading of § 28.33 might prompt one to conclude that, so far as it concerns entitlement to interest, the statute applies only to interest on funds clearly owned by the county (such as charges for certifications) and that it does not apply to interest on private funds deposited under the direction of another statute. The Florida Supreme Court, however, has read § 28.33 otherwise and has ruled that it applies to interest earned on deposited private funds. That reading of the State's statute is within the Florida court's competency, and we must take the statute as so read and interpreted.

III

The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar ones: "nor shall private property be taken for public use, without just compensation." That prohibition, of course, applies against the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 239, 17 S.Ct. 581, 585-86, 41 L.Ed. 979 (1897); *Perm Central Transportation Co.* v. *New York City,* 438 U.S. 104, 122, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978). Our task is to determine whether the second exaction by Seminole County amounted to a "taking"—it was obviously uncompensated-within the Amendment's proscription.

The principal sum deposited in the registry of the court plainly was private property, and was not the property of Seminole County. This is the rule in Florida, *Phipps* v. *Watson,* 108 Fla. 547, 551, 147 So. 234, 235 (1933), as well as ***161** elsewhere. See *Coudert* v. *United States,* 175 U.S. 178, 20 S.Ct. 56, 44 L.Ed. 122 (1899); *Branch* v. *United States,* 100 U.S. 673, 25 L.Ed. 759 (1880); *Sellers*

v. *Harris County*, 483 S.W.2d, at 243. We do not understand that the appellees contend otherwise so far as the fund's principal is concerned.

Appellees submit, Tr. of Oral Arg. 26, 29-and we accept the proposition-that, apart from statute, Florida law does **451 not require that interest be earned on a registry deposit. See 374 So.2d, at 953. We, of course, also accept the further proposition, pressed upon us by the appellees, that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Board of Regents* v. *Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). But a mere unilateral expectation or an abstract need is not a property interest entitled to protection. See, for example, *Fox River Paper Co.* v. *Railroad Comm'n,* 274 U.S. 651, 47 S.Ct. 669, 71 L.Ed. 1279 (1927); *United States* v. *Willow River Power Co.,* 324 U.S. 499, 65 S.Ct. 761, 89 L.Ed. 1101 (1945). See also *Penn Central Transportation Co.* v. *New York City, supra; Andrus* v. *Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979).

Webb's creditors, however, had more than a unilateral expectation. The deposited fund was the amount received as the purchase price for Webb's assets. It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors. Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court. The creditors thus had a state- created property right to their respective portions of the fund.

It is true, of course, that none of the creditor claimants had any right to the deposited fund until their claims were recognized and distribution was ordered. See *162*Aron v. Snyder*, 90 U.S.App.D.C. 325, 327, 196 F.2d 38, 40, cert. denied, 344 U.S. 854, 73 S.Ct. 92, 97 L.Ed. 663 (1952). That lack of immediate right, however, does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest, the fruit of the fund's use, that is realized in the interim. To be sure, § 28.33 establishes as a matter of Florida law that interest is to be earned on deposited funds. But the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest.

We therefore turn to the interest issue. What would justify the county's retention of that interest? It is obvious that the interest was not a fee for services, for any services obligation to the county was paid for and satisfied by the substantial fee charged pursuant to § 28.24 and described specifically in that statute as a fee "for services" by the clerk's office. Section 28.33, in contrast, in no way relates the interest of which it speaks to "services rendered." Indeed, if the county were entitled to the interest, its officials would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is held; there would be, therefore, a built-in disincentive against distributing the principal to those entitled to it.

The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal. See, *e. g*, *James Talcott, Inc.* v.

Allahabad Bank, Ltd., 444 F.2d 451, 463 (CA5), cert. denied *sub nom. City Trade & Industries, Ltd.* v. *Allahabad Bank, Ltd.*, 404 U.S. 940, 92 S.Ct. 280, 30 L.Ed.2d 253 (1971); *Murphy v. Travelers Ins. Co.*, 534 F.2d 1155, 1165 (CA5 1976); *In re Brooks & Woodington, Inc.*, 505 F.2d 794, 799 (CA7 1974); *McMillan* v. *Robeson County*, 262 N.C., at 417, 137 S.E.2d, at 108; *Sellers* v. *Harris County*, 483 S.W.2d, at 243; *Southern Oregon Co.* v. *Gage*, 100 Or. 424, 433, 197 P. 276, 279 (1921); **163Board of Law Library Trustees* v. *Lowery*, 67 Cal.App.2d 480, 154 P.2d 719 (1945); *Kiernan* v. *Cleland*, 47 Idaho 200,273 P. 938 (1929). [FN6]

FN6. The appellees at oral argument conceded that if coupon bonds, rather than cash, had been deposited in the registry, the coupons would follow the principal and could not be claimed by the county under § 28.33. Tr. of Oral Arg. 31.

**452 The Florida Supreme Court, in ruling contrary to this long established general rule, relied on the words of § 28.33 and then proceeded on the theory that without the statute the clerk would have no authority to invest money held in the registry, that in some way the fund assumes temporarily the status of "public money" from the time it is deposited until it leaves the account, and that the statute "takes only what it creates." Then follows the conclusion that the interest "is not private property." 374 So.2d, at 952- 953.

This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare. See, *e. g.*, *Andrus* v. *Allard, 444* U.S., at 64-68, 100 S.Ct., at 326-328;

Penn Central Transportation Co. v. New *York City,* 438 U.S., at 125-129,98 S.Ct. at 2660-2662.

Here, however, Seminole County has not merely "adjust[ed] the benefits and burdens of economic life to promote the common good." *Id.*, at 124, 98 S.Ct. at 2659. Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts. Indeed, "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

No police power justification is offered for the deprivation. Neither the statute nor appellees suggest any reasonable basis to sustain the taking of the interest earned by the interpleader fund. The county's appropriation of the beneficial use of the *164 fund is analogous to the appropriation of the use of private property in *United States* v. *Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). There the Court found a "taking" in the Government's use of air space above the claimant's land as part of the flight pattern for military aircraft, thus destroying the use of the land as a chicken farm. "*Causby* emphasized that Government had not 'merely destroyed property [but was] using a part of it for the flight of its planes.[1] " *Penn Central,* 438 U.S., at 128, 98 S.Ct. at 266, quoting from *Causby,* 328 U.S., at 262-263, n. 7,66 S.Ct. at 1066, n. 7.

Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

IV

We hold that under the narrow circumstances of this case—where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others—Seminole County's taking **453 unto itself, under § 28.33 and 1973 FlaXaws, ch. 73-282, the interest earned *165 on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders.

The judgment of the Supreme Court of Florida is reversed.

It is so ordered.

Supreme Court of Illinois

James H. **CANEL**, Appellee,

v.

Judy Baar **TOPINKA** et al., Appellants.

No. 96755.

Oct. 7, 2004.

Justice FREEMAN delivered the opinion of the court:

In this appeal, defendants argue that, pursuant to section 15 of the Uniform Disposition of Unclaimed Property Act (765 ILCS 1025/15 (West 1998)), the state is entitled to retain dividends issued on shares of stock which were presumed abandoned and delivered to the state. Plaintiff argues the dividends are private property which must be returned to the property owner along with the shares of stock. The appellate court determined that the dividends were the private property of plaintiff, and remanded to the circuit court of Cook County for a determination of just compensation. 342 Ill. App. 3d 65, 276 Ill. Dec 86, 793 N. E. 2d 845 134 Ill. 2d R. 317. This appeal followed.

BACKGROUND

Plaintiff, James H. Canel, was the owner of 288 shares of stock of Patrick Industries, Inc. Harris Bank was the holder of the stock, as defined in the Uniform Disposition of Unclaimed Property Act (Act) (765 ILCS 1025/1 *et seq.* (West 1998), now 765 ILCS 1025/0.05 *et seq.* (West 2002)). In December 1998, Harris Bank delivered the stock to defendant Mitchell Murdock, the Director of Financial Institutions, as property presumed abandoned under the Act. See 765 ILCS 1025/11 (West 1998).[FN1] Defendant Murdock is presently the director of the Unclaimed Property Division of the office of the Treasurer of the State of Illinois.

> FN1. The rights, powers, duties and functions vested in the Department of Financial Institutions to administer the Act were transferred to the State Treasurer on July 1, 1999. See 765 ILCS 1025/0.05 (West 2002). The Act now provides for delivery of property presumed abandoned to the State Treasurer. See 765 ILCS 1025/11 (West 2002).

Plaintiff learned of the remittance of the stock to the Department of Financial Institutions in January 1999. Thereafter, on April 9, 1999, plaintiff submitted a claim to defendant Murdock for the return of the stock along with any dividends or other accruals that had been issued during the time the Department of Financial Institutions held the stock. On August 31, 1999, plaintiff completed a form prescribed by the State Treasurer, defendant Judy Baar Topinka, for the return of his property. The Treasurer returned the stock, but refused to return the dividends issued on the stock.[FN2]

> FN2. In count III of the complaint, filed on his own behalf, plaintiff alleged that defendants retained 88 shares of the stock. It appears, however, that defendants never had the shares in question. The circuit court dismissed count III, and plaintiff has not appealed the dismissal.

On September 11, 2000, plaintiff filed a class action on behalf of himself and others similarly situated. In the complaint, plaintiff described defendant Topinka as being charged with supervising and administering the Unclaimed Property Division of the office of the Illinois Treasurer.

Plaintiff alleged that defendant Murdock is charged with administering the Unclaimed Property Division, including disposition of all property that is remitted to the Division and payment of all approved claims for return of such property. All counts of the complaint pertained to both defendants.

Plaintiff alleged that numerous persons and entities own private property deemed abandoned and held by the Treasurer as custodian. Plaintiff further alleged that it is defendants' policy and practice not to return dividends, interest and accruals earned on the property to the property owners upon application. Instead, defendants retain the dividends, interest and accruals earned on the property for use by ****316 ***628** the state. In count I of the complaint, plaintiff maintained that by retaining the dividends, interest and other accruals earned on the property and using them for state purposes, defendants violate article I, section 15, of the Constitution of 1970 (III. Const. 1970, art. I, § 15), which prohibits the taking of private property without payment of just compensation. In count II of the complaint, plaintiff maintained that defendants' policy and practice of retaining the accruals earned on the property violate the prohibition of the fifth amendment to the United States Constitution, made applicable to the states by the fourteenth amendment, that private property may not be taken for public use without just compensation. U.S. Const, amends. V, XIV. Plaintiff also claimed a violation of 42 U.S.C. § 1983.

On November 20, 2000, defendants filed a motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2000)). In this combined motion to dismiss, defendants stated grounds for dismissal under both section 2-615 (735 ILCS 5/2-615 (West 2000)) and section 2-619 of the Code of Civil

Procedure (735 ILCS 5/2-619 (West 2000)). As grounds for dismissal pursuant to section 2-615, defendants maintained that plaintiff failed to meet the necessary prerequisites for a class action; that plaintiff failed to state a claim for violation of his constitutional rights; and that plaintiff, having failed to exhaust the state administrative review process, could not show a violation of 42 U.S.C. § 1983. In support of the claim that plaintiff failed to show a constitutional violation, defendants argued that, pursuant to section 15 of the Act, a property "owner is not entitled to receive income or other increments accruing" after the property is delivered to the state. 765 ILCS 1025/15 (West 1998). As grounds for dismissal under section 2-619, defendants maintained that plaintiff failed to show the existence of a present case or controversy because the shares of stock had been returned to him; and that plaintiffs claims were barred pursuant to the doctrine of sovereign immunity. In reply, plaintiff argued, *inter alia,* that there was a justiciable controversy because defendants refused to return the earnings on the shares of stock. Plaintiff also argued that two exceptions to the exhaustion doctrine applied: first, a party need not exhaust his administrative remedies when he attacks the constitutionality of a statute on its face; and second, a party need not exhaust his administrative remedies where it is patently futile to do so.

The circuit court found the motion to dismiss to be well founded and granted the motion. The court reasoned: "I think you needed to pursue administrative review, and you didn't. You weren't deprived of the remedy. And any residual claims that you address in your complaint appears to be claims that would have to be pursued in a court of claims. You haven't been deprived of the process in the face of things."

The appellate court reversed and remanded. 342 Ill.App.3d

65, 276 Ill.Dec. 86, 793 N.E.2d 845. The court noted that at oral argument defendants conceded plaintiff was not required to exhaust his administrative remedies or seek relief in the Court of Claims. 342 Ill.App.3d at 68, 276 Ill.Dec. 86, 793 N.E.2d 845. The court further noted that plaintiff acknowledged he had not appealed from the dismissal of count III of the complaint. 342 Ill.App.3d at 68 n. 1, 276 Ill.Dec. 86, 793 N.E.2d 845. The court then determined that section 15 of the ***317** Act is not an escheat law. 342 Ill.App.3d at 72, 276 Ill.Dec. 86, 793 N.E.2d 845. Consequently, the state could not use its powers of escheat as a basis for ***629 retaining the dividends at issue. 342 Ill.App.3d at 72, 276 Ill.Dec. 86, 793 N.E.2d 845. The court also found that the shares of stock and the dividends earned on the stock remained the property of plaintiff, not the state. 342 Ill.App.3d at 74, 276 Ill.Dec. 86, 793 N.E.2d 845. Lastly, the court determined that a "taking" occurred when the Treasurer decided not to return the dividends to plaintiff. 342 Ill.App.3d at 75, 276 Ill.Dec. 86, 793 N.E.2d 845. The court remanded the matter to the circuit court for a determination of the compensation, if any, due plaintiff. 342 Ill.App.3d at 76, 276 Ill.Dec. 86, 793 N.E.2d 845.

After defendants' petition for appeal was allowed, we also took under advisement plaintiff's motion for judicial notice of a pamphlet published by the Treasurer, interpreting the Act. We deny the motion because the material offered reiterates information already available to the court. We now turn to a discussion of the issues at bar.

ANALYSIS

As noted above, the circuit court granted defendants' hybrid motion for dismissal on the section 2-615 grounds that plaintiff had failed to exhaust his administrative remedies. A motion under section 2-615 of the Code of Civil Procedure attacks the legal sufficiency of the complaint. *Illinois Graphics Co.* v. *Nickum,* 159 III.2d 469, 484, 203 Ill.Dec. 463, 639 N.E.2d 1282 (1994). Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *Illinois Graphics,* 159 Ill.2d at 484, 203 III.Dec. 463, 639 N.E.2d 1282; *Kolegas v. Heftel Broadcasting Corp.,* 154 Ill.2d 1, 8, 180 III.Dec. 307, 607 N.E.2d 201 (1992). Thus,the question presented by a section 2-615 motion is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Vernon* v. *Schuster,* 179 Ill.2d 338, 344, 228 Ill.Dec. 195, 688 N.E.2d 1172(1997); *Bryson* v. *News America Publications, Inc.,* 174 Ill.2d 77, 86-87, 220 Ill.Dec. 195, 672 N.E.2d 1207 (1996). In ruling on a section*318 2-615 motion, a trial court is to consider only the allegations of the pleadings. *Illinois Graphics,* 159 Ill.2d at 484, 203 Ill.Dec. 463, 639 N.E.2d 1282; *Urbaitis* v. *Commonwealth Edison,* 143 Ill.2d 458, 475, 159 Ill.Dec. 50, 575 N.E.2d 548 (1991). Further, the trial court should dismiss the cause of action only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery. *Bryson,* 174 Ill.2d at 86-87, 220 Ill.Dec. 195, 672 N.E.2d 1207; *Illinois Graphics,* 159 Ill.2d at 488, 203 Ill.Dec. 463, 639 N.E.2d 1282. A court of review determines *de novo* whether the trial court should have granted dismissal. *Beahringer* v. *Page,* 204 Ill.2d 363, 369, 273 Ill.Dec. 784, 789 N.E.2d 1216 (2003).

The appellate court believed that plaintiffs failure to exhaust his administrative remedies limited the court to confine its analysis solely to the question of whether section 15 was facially unconstitutional in its entirety. We do not agree that the analysis must be limited in this fashion because, as we will explain, two other exceptions to the exhaustion doctrine are also present in this case. In order to facilitate an understanding of our holding with respect to the exhaustion issue, we believe it helpful to set out a brief overview of the procedures involved in both the reporting and the claiming of abandoned property under the Act.

Persons in possession of property belonging to another are required, pursuant to the Act, to timely report and to remit to the Director of Financial Institutions (now to the Treasurer) property presumed abandoned. 765 ILCS 1025/1 *et* ****630 seq.* (West 1998). Generally, property is presumed abandoned if it is unclaimed by the owner for a period of five years. See 765 ILCS 1025/2 (West 1998). The property holder's responsibility to the owner for the return of the property terminates once the property is delivered to the state. 765 ILCS 1025/14 (West 1998).

Upon payment or delivery of the property to the Director, the state assumes custody and is responsible for *319 the safekeeping of the property. [FN3] 765 ILCS 1025/14 (West 1998).Within 120 days of delivery of the property, for property valued at more than $100, the Director is required to cause notice to be published once in a newspaper of general circulation in the county encompassing the last known address of the property owner. 765 ILCS 1025/12 (West 1998). The notice advises the property owner that all claims regarding the property must be directed to the state. After a reasonable lapse of time, the Director may sell the property at public sale to the highest bidder. 765 ILCS 1025/17 (West 1998). If the probable cost of the sale exceeds the value of the property, the Director may destroy or otherwise dispose of the property. 765 ILCS 1025/17 (West 1998). The proceeds of the sale as well as other funds received under the Act are transferred to the Treasurer, who is then required to set aside in a separate trust fund an amount not exceeding $2.5 million for payments of claims allowed by the Director. The balance of the funds is deposited in the State Pensions Fund.

> FN3. The Director may decline to receive any property which he deems to have a value less than the cost of giving notice and holding sale, or he may postpone taking possession until a sufficient sum has accumulated. 765 ILCS 1025/22 (West 1998).

Any person claiming an interest in property delivered to the state may file a claim to the property or to the proceeds from the sale of the property. 765 ILCS 1025/19 (West 1998). The Director shall consider the claim and may, in his discretion, hold a hearing, to be conducted by the Director or a hearing officer, and receive evidence concerning the claim. 74 Ill. Adm.Code §§ 760.100 , 760.110 (2004). The Director issues a final written decision allowing or denying the claim. If the claim is allowed, and after deducting an amount not to exceed $20 to cover the cost of notice publication and related clerical *320 expenses, the Treasurer is required to pay the claim promptly. 765 ILCS 1025/20 (West 2000).

When the claim is allowed, the state returns the property or proceeds from the sale of the property. The state, however, does not return the income earned on the property during the time that the state serves as custodian of the property. Section 15 of the Act provides:
"When property is paid or delivered to the Director under this Act, the owner is not entitled to receive income or other increments accruing thereafter, except that income accruing on unliquidated stock and mutual funds after July 1, 1993, may be paid to the owner." 765 ILCS 1025/15 (West 1998).

It is by virtue of section 15 that the state in this case insists that plaintiff is not entitled to the dividends at issue. We note that the shares of stock were unliquidated and were returned to plaintiff.

In the case at bar, plaintiff submitted a claim to defendants for the return of the stock and dividends. Plaintiff also completed a form prescribed by defendants for the return of his property. 38 Ill. Adm.Code § 180.100 (1992), now recodified at 74 Ill. Adm.Code § 760.100 (2004). However, plaintiff did not specifically request a hearing by the Treasurer (see 765 ILCS 1025/20 (West 1998)) or seek judicial review***631 of the final administrative decision of the Treasurer pursuant to the provisions of the Administrative Review Law. See 765 ILCS 1025/21 (West 1998).

The doctrine of exhaustion of administrative remedies holds that a party aggrieved by an administrative decision cannot seek judicial review without first pursuing all available administrative remedies. *County of Knox ex rel. Masterson v. The Highlands, L.L.C.*, 188 Ill.2d 546, 551, 243 Ill.Dec. 224, 723 N.E.2d 256 (1999); *Castaneda* v. *Illinois Human Rights Comm'n*, 132 Ill.2d 304, 308, 138 Ill.Dec. 270, 547 N.E.2d 437 (1989). The reasons for the exhaustion requirement are to allow the administrative agency to fully develop and consider the facts of the case before *321 it, to allow the agency to utilize its expertise, and to allow the aggrieved party to obtain relief from the agency, thus making judicial review unnecessary. *Castaneda*, 132 Ill.2d at 308, 138 Ill.Dec. 270, 547 N.E.2d 437, citing *Illinois Bell Telephone Co.* v. *Allphin*, 60 Ill.2d 350, 358, 326 N.E.2d 737 (1975).

The exhaustion doctrine includes administrative review in the circuit court. *Arvia* v. *Madigan*, 209 Ill.2d 520, 532, 283 Ill.Dec. 895, 809 N.E.2d 88 (2004). Where the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2000)) is applicable and provides a remedy, a circuit court may not redress a party's grievance through any other type of action. *Dubin* v. *Personnel Board,* 128 W.2d 490, 498, 132 Ill.Dec. 437, 539 N.E.2d 1243 (1989). The circuit court's power to resolve factual and legal issues arising from an agency's decision must be exercised within its review of the agency's decision and not in a separate proceeding. *County of Knox,* 188 Ill.2d at 552, 243 Ill.Dec. 224, 723 N.E.2d 256; *Dubin,* 128 Ill.2d at 499, 132 Ill.Dec. 437, 539 N.E.2d 1243.

This court has, however, recognized several exceptions to the doctrine of exhaustion of administrative remedies. *Castaneda,* 132 Ill.2d at 308-09, 138 Ill.Dec. 270, 547 N.E.2d 437. An aggrieved party may seek judicial review of an administrative decision without complying with the exhaustion of remedies doctrine where a statute, ordinance or rule is attacked as unconstitutional on its face. *Arvia,* 209 Ill.2d at 532-33, 283 Ill.Dec. 895, 809 N.E.2d 88. A party may also seek review where issues of fact are not presented and agency expertise is not involved. *Landfill, Inc.* v. *Pollution Control Board,* 74 Ill.2d 541, 550-51, 25 Ill.Dec. 602, 387 N.E.2d 258 (1978). Moreover, exhaustion is not required if the administrative remedy is inadequate or futile or in instances where the litigant will be subjected to irreparable injury due to lengthy administrative procedures that fail to provide interim relief. *Castaneda,* 132 Ill.2d at 308, 138 Ill.Dec. 270, 547 N.E.2d 437.

We note that, in this case, plaintiff specifically alleged that although section 15 of the Act allows the state discretion in returning the dividends of unliquidated ***322** stock to owners, "it is the policy and practice of [the Treasurer's office] not to return to the property owner any income * * * on securities held in custody pursuant to the Act." Plaintiff further alleged that "in no case" has "such income * * * ever been returned to the owner." In their motion to dismiss, defendants did not dispute plaintiffs allegations on this point. Indeed, one of defendants' bases for dismissal was that plaintiff was "not entitled" to the dividends under the Act. In light of the parties' positions, this is not a case where facts need to have been developed before the agency nor does the question presented constitute a matter for agency expertise. Rather, the issue revolves around the construction and meaning ***632 of section 15 of the Act. Moreover, the pleadings reveal that it would have been futile for plaintiff, or any other similarly situated claimant for that matter, to exhaust administrative remedies with respect to asserting a claim for dividends on stock held by defendants pursuant to the Act because the defendants' position in these types of cases is that the Act transforms into state property dividends earned on shares of stock presumed abandoned under the Act. Defendants argue that because of that fact they need not return dividends to the previous owner. Section 15, however, clearly contains an exception that provides that claimants may in fact be entitled to dividends on unliquidated stock. Given that defendants, as alleged by plaintiff, have *never* chosen to exercise their discretion in favor of a claimant-despite the permissive language of the statute-we hold that exhaustion, under these circumstances, was unnecessary and that our review of section 15 is not limited solely to its facial validity. With this procedural matter settled, we now turn the merits.

Plaintiff views defendants' taking of his dividends as a constitutionally improper taking of private property. He notes that the Act at issue gives to the state only ***323** custodial rights to the property that is presumed abandoned. Defendants dispute this, maintaining that the Act bestows to the state ownership rights to the future income that accrues on the abandoned property. Accordingly, defendants claim that owners who abandon property no longer retain a property interest in the income accruing on the abandoned property once the property is transferred to the state and that, as a result, no taking occurs. Plaintiff responds that the state does not take title to presumptively abandoned property and any earnings on the property, while in the state's custody, belong to the owner of the property. Because this case involves dividends accruing on unliquidated stock, we confine our analysis of section 15 to only dividends earned on shares of unliquidated stock held by the state pursuant to the Act.

As noted, the property presumed abandoned in this case consisted of shares of stock in a corporation. The shares of a corporation are the units into which the proprietary interests in a corporation are divided. 805 ILCS 5/1.80 (West 2000). The proprietary interests represented by the shares of stock consist of management or control rights, rights to earnings, and rights to assets. *Stroh* v. *Blackhawk Holding Corp.*, 48 Ill.2d 471, 479, 272 N.E.2d 1 (1971); 11 Fletcher's Cyclopedia of Private Corporations § 5081 (rev.vol.2003).

Once a dividend is declared, it becomes a corporate debt owed to the shareholders in proportion to their shares in the corporation, and, if the corporation refuses to pay, the shareholders may sue to recover the unpaid dividend. 11 Fletcher's Cyclopedia of Private Corporations § 5322 (rev.vol.2003). A lawfully declared dividend is the separate property of the shareholders, wholly disconnected from their shares. *Ford* v. *Ford Manufacturing Co.*, 222 Ill.App. 76, 83 (1921). Stated simply, a dividend belongs to the owner of the shares. In this case ***324** that owner remained, at all times, the plaintiff, James Canel.

Defendants maintain that the state is entitled to retain dividends issued on shares of stock during the time the state holds the stock in its custody. In response, plaintiff argues that defendants' appropriation of the dividends by the convenience of labeling the property abandoned and the forced turnover of the property from the bank to the state is inconsistent with the custodial nature and ***633 purpose of the Act and constitutes an unconstitutional taking of private property.[FN4]

> FN4. We analyze the issues at bar in the context of the dividends defendants failed to return to plaintiff. We note that plaintiff brought this action on behalf of himself and other property owners. Plaintiff claims that defendants have failed to return interest, dividends, and other accruals of earnings on property presumed abandoned. At this time, the class has not been certified and we do not know whether it will include all property owners deprived of income earned on property or whether it will be limited to stockholders deprived of dividends issued on their stock.

In 1961, our General Assembly enacted, with some modifications, the Uniform Disposition of Unclaimed Property Act, which had been promulgated by the National Conference of Commissioners on Uniform State Laws.[FN5] See *Country Mutual Insurance Co.* v. *Knight,* 40 Ill.2d 423, 424, 240 N.E.2d 612 (1968); M. Bishop, *The New Illinois Unclaimed Property Act,* 50 Ill. B.J. 914 (1962). The purpose of the Act is to give custody of certain enumerated property to the state when the property's owner "does not appear to be aware of its existence and cannot be located." M. Bishop, *The New Illinois Unclaimed Property Act,* 50 Ill. B.J. 914 (1962). Various courts and commentators have stressed the custodial nature of this *325 type of act. See *Insurance Co. of North America* v. *Knight*, 8 Ill.App.3d 871, 876, 291 N.E.2d 40 (1972) (recognizing "theory" of the legislation is "that it is custodial in character and that the State takes custody for the owner"); *Commonwealth Edison Co.* v. *Vega*, 174 F.3d 870, 872 (7th Cir. 1999) (noting that under the Illinois Act's provisions, "[t]he State does not acquire title to the property. It is merely a custodian"); Prefatory Note to the 1995 Act, 8C U.L.A. 89 (2001) (emphasizing that "the State does not take title to unclaimed property, but takes custody only, and holds the property in perpetuity for the owner"); M. Bishop, *The New Illinois Unclaimed Property Act*, 50 Ill. B.J. 914 (1962) (noting that "[u]nder the Illinois Act, the State does not gain title to unclaimed property, but merely perpetual custody"). We agree with the Seventh Circuit's description of the state's role under the Act:

> FN5. The 1954 Uniform Act was subsequently superseded by the 1966 Uniform Unclaimed Property Act, which was again superseded in 1981 by a new act, which was later superseded by Unclaimed Property Act of 1995. Prefatory Note to 1995 Act, 8C U.L.A. 88 (2001).

"[N]ot only does the state have free use of the property unless and until the owner reclaims it; the state is not required to (and Illinois does not) pay any interest to a reclaiming owner. [Citations.] In effect, the property is an interest-free loan to the state-in perpetuity if the owner never shows up to claim it." *Vega*, 174 F.3d 870 at 872. See also Note, *Virginia's Acquisition of Unclaimed and Abandoned Personal Property*, 27 Wm. & Mary L.Rev. 409, 419-20 (1986) (noting three dual policies of the uniform law including the protection of owners in order to reunite them with their property while providing adopting states with a method for raising revenue).

In this case, we have already explained why, under corporate law, dividends issued on plaintiffs shares of corporate stock are the property of plaintiff. Defendants contend that section 15 works to divest plaintiff of his ownership rights to the dividends and transforms those ownership rights to the state. Defendants maintain that, because the shares of stock were presumed abandoned under the Uniform Disposition of Unclaimed Property ***326** Act, the state became entitled to the dividends by operation of the Act as interpreted in light of the common law doctrines of escheat and *bona* ******634*** *vacantia* and that, as a result, no taking occurred. We disagree with the state's position for several reasons.

[24][25] Section 15, as originally enacted by our General Assembly, did not include the exception pertaining to unliquidated stock that appears in the current version of the statute. This was consistent with the original uniform act upon which it was based. However, in 1981, the uniform act was amended to allow owners to receive "any dividends, interest, or other increments realized or accruing on the property at or before liquidation or conversion thereof into money." 8C U.L.A. 239 (2001); see also 8C U.L.A. 239, § 21, Comment (2001) (noting that the 1981 model uniform act changed section 15 of the 1966 act, which had provided "that the owner was not entitled to receive any income or other increment accruing after the delivery of unclaimed property to [the state]"). The current version of section 15 of the Act went into effect on August 26, 1992 (see Pub. Act 87-925 § 1, eff. August 26, 1992), and now provides that owners "may" receive income accruing on unliquidated stock. Except in very unusual circumstances affecting the public interest, the legislature's use of the word "may" indicates that the statute is permissive as opposed to mandatory. *In re Marriage of Freeman,* 106 Ill.2d 290, 298, 88 Ill.Dec. 11, 478 N.E.2d 326

(1985). We agree with defendants that the plain language of the statute indicates that the state may return dividends to owners in addition to the actual shares of the stock at issue. However, we do not agree with defendants' view that the common law principles of escheat and *bona vacantia* transform the presumed abandoned property into state property such that a taking does not occur.

As we have endeavored to show, the Act is custodial in nature. This custodial nature is simply incompatible *327 with the doctrines of escheat and *bona vacantia*. The animating factor behind these doctrines is that the state, as sovereign, is entitled to property abandoned or otherwise ownerless. At common law, property is considered abandoned when the owner, intending to relinquish all rights to the property, leaves it free to be appropriated by any other person. *Hendle* v. *Stevens,* 224 Ill.App.3d 1046, 1056, 166 Ill.Dec. 868, 586 N.E.2d 826 (1992). Clearly, property that is presumptively abandoned under the Act is not necessarily abandoned at common law. As explained in Corpus Juris Secundum:
"The Uniform Disposition of Unclaimed Property Act and other similar unclaimed property acts are not true escheat statutes. The dual objectives of this type of statute are to reunite owner with unclaimed funds or property and to give the state, rather than the holder, the benefit of the use of the unclaimed funds or property. The custodial nature of the Uniform Disposition of Unclaimed Property Act serves to establish that the rights of the state are merely derivative from the rights of the owners of the abandoned property. *The presumption of abandonment under the Uniform Disposition of Unclaimed Property Act is statutory and independent from common law principles of abandonment.*"" (Emphasis added.) 30A C.J.S. *Escheat* § 2(b), at 455 (1992).

And, in *Presley v. Memphis,* 769 S.W.2d 221 (Tenn.App.1988), the court explained:"Although [Uniform Disposition of Unclaimed Property Act] cases are often cited under the heading 'Escheat,' delivery of [Uniform Disposition of Unclaimed Property Act] property is not escheat. See, e.g., *Travelers Express Co., Inc.* v. *State of Minnesota,* 506 F.Supp. 1379, 1380 (D.Minn. 1981). Even though experience shows that ***635 abandoned property is seldom claimed, title to the property remains in the owner and never vests in the state. *Douglas Aircraft Co. v. Cranston,* 58 Cal.2d 462, 374 P.2d 819, 24 Cal.Rptr. 851, 98 ALR2d [298], 300 (1962); T.C.A. § 66-29-123. The owner may recover at any time no matter how remote. ***328** *South Carolina Tax Commission* v. *York Electric Cooperative, Inc.,* 275 S.C. 326, 270 S.E.2d 626, 628 (1980)." *Presley,* 769 S.W.2d at 223-24.

Based on the record, we conclude the stock at issue in this case was not abandoned at common law.

An examination of the doctrine of escheat supports this conclusion. At common law, escheat applied to the determination of real property to the state as sovereign. See 30A C.J.S. *Escheat* § 2(a), at 453 (1992) (defining escheat as "a procedure with ancient origins whereby the sovereign may acquire title to abandoned property if after a number of years no rightful owner appears. Escheat signifies a reversion of property to the state in consequence of a want of any individual competent to inherit, with the state being deemed to occupy the place and hold the rights of the feudal lord"). The right of the state to take property by escheat is generally regulated by statute, and modern statutes have made escheat applicable to personalty.

In Illinois, the death of the property owner is the starting point for escheat of personal property. The Escheats Act (755 ILCS 20/0.01 *et seq.* (West 1998)) provides for the devolution of personal estates to the state, as sovereign, in the event the property owner dies without heirs. The Act requires issuance of letters of office and administration of the estate in conformity with the probate laws. 755 ILCS 20/2 (West 1998). After payment of debts and costs of administration, the circuit court enters an order directing the administrator to pay the balance in his possession to the county treasurer. 755 1LCS 20/2 (West 1998). Accordingly, one of the features of escheat as codified here in Illinois is the fact that a judicial finding is necessary before the state, as sovereign, takes over the ownership rights to the property.

This brief explanation makes it clear that the dividends at issue here are not subject to escheat. Plaintiff is alive and desirous of the return of his property. Thus, we are not concerned with the determination*329 of the personal property of a person who died leaving no known heirs or representatives capable of inheriting the estate. We therefore disagree with defendants' suggestion that state was entitled to the ownership of the dividends by virtue of common law principles of escheat.

We also find wanting the support defendants claim from the doctrine of *bona vacantia*. "At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as *bona vacantia.*" *Anderson National Bank v. Luckett,* 321 U.S. 233, 240, 64 S.Ct. 599, 603, 88 L.Ed. 692, 701 (1944). The underlying principle for application of *bona vacanlia* was that the state, as sovereign and original owner of all properly, had the right to reversion of the property.

We note that with certain exceptions. Illinois has adopted "[t]he common law of England *** and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First.'" 5 ILCS 50/1 (West 2002). This court, however, has not had the occasion to determine the applicability *o/* the doctrine of *bona vacanlia* to Illinois jurisprudence. In considering the applicability ***636 of the doctrine, we note the well-reasoned opinion of the Seventh Circuit in *Illinois Bell Telephone Co. v. Slattery,* 102 F.2d 58 (7th Cir, 1939). The court there rejected the state's claim, predicated upon the doctrine of *bona vacantia,* to refunds unclaimed by subscribers of the telephone company. Having reviewed the origins of the doctrine at common law, the court declared itself unsatisfied that the doctrine was recognized by the common law of England prior to the year 1606, the fourth year of James the First. *Slattery,* 102 F.2d at 67-68. The court also noted that the doctrine of *bona vacantia* is generally applied to cases involving: "(1) death intestate with no next of kin *330 of person capable of inheriting; (2) non-charitable trust with a failure of beneficiaries; or (3) corporation dissolved leaving property to which neither stockholders nor creditors were entitled under the English corporation law." *Slattery,* 102 F.2d at 68. The court concluded: "If, however, we should be in error in our conclusion that the only property interest which the subscriber had was *a* claim against plaintiff which was extinguished at the expiration of the limitation period, thereby leaving nothing to which the state could succeed, we would yet be compelled to decide against the state's contention on the ground that (he common law on which it relies is of such an uncertain and indefinite nature in its scope and limitations that this court would not be justified in proclaiming its existence as a rule of law of Illinois applicable to a situation such as is here presented." *Slattery.* 102 F.2d at 68.

We agree with the Seventh Circuit that the origins of the doctrine of *bona vacantia* are murky. And, although our research is not intended to be exhaustive, we also agree that the doctrine appears limited in its applications. See *Hindcastle Lid. v. Bahara Attenborough Associates Ltd* [1997] A.C. 70 (H . L . 1997) (insolvent's interest in a lease): *Re Poilcrs Oils Ltd.* [1985] BCLC 203 (Ch.1985) (liquidator of a company sought an order to disclaim chlorinated waste oil); *Attorney-General of the Duchy of Lancaster v. G.E. Overton (Farms) Ltd.* [1982] Ch 277 (Eng.C.A.1981) (coins minted in (he Central or Gallic Empire between A.D. 253 and A.D. 281 were not treasure trove and, consequently, not subject to *bona vacantia): In re Barnnett's Trusts* [1902] 1 Ch. 847, 1902 WL 12573 (funds belonging to an Austrian who died a bastard intestate and without heirs). Lastly, we recognize that the Illinois Escheats Act is, in essence, a form of *bona vacantia* since it applies to personally. However, as to personalty, the Act is applicable only upon the death of the property owner "without any legacy, and leaving no known heirs or representatives capable of inheriting the same, or the legatees thereof are incapable of holding the same." ***331755** 1LCS 20/1 (West 1998). Thus, we find that the same reasons which render the doctrine of escheat inapplicable to this case also render the doctrine of *bona vacantia* inapplicable as well.

Defendants further claim that the state could have acquired the shares of stock and the dividends issued thereon because the shares of stock were abandoned property. We know of no common law rule which supports defendants' position that, by virtue of plaintiff's presumed abandonment of his property, the dividends declared as an incident of ownership of the property become the property of the state. We have explained how the common law doctrines that have historically been used to transform private property to state property have no bearing in this case. Defendants propose that the state is "generous" in returning the shares of stock and keeping only the dividends issued on the stock. We reject the notion ***637 that the state, as the custodian of stock placed in its hands for safekeeping, may claim that it is entitled to the dividends issued on the stock.[FN6] See *Insurance Co. of North America* v. *Knight,* 8 Ill.App.3d 871, 291 N.E.2d 40 (1972) (the rights of the state are derivative from the rights of the owner). At all times the shares of stock remained the private property of plaintiff. Under the circumstances, the dividends, as an incident of ownership, were also private property.

> FN6. In its custodial nature, the Uniform Disposition of Unclaimed Property Act contrasts sharply with the Escheats Act. Under the Escheats Act, with the exception of minors and persons under legal disability, any person claiming an interest in the property must do so within 10 years or be forever barred from filing a claim. See 755 ILCS 20/7 (West 2002).

The fifth amendment provides that private property shall not be taken for public use, without just compensation. U.S. Const., amend. V. That prohibition is made applicable to the states through the fourteenth amendment. *332 *Webb's Fabulous Pharmacies, Inc. v. Bcckwith.* 449 U.S. 155, 160, 101 S.Ct. 446, 450, 66 L.Ed.2d 358, 364 (1980), citing *Chicago, Burlington & Ouincy R.R. Co.* v. *City of Chicago,* 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979. 985 (1897). The Illinois Constitution likewise prohibits the taking of private property for public use without just compensation. Ill. Const.1970. art. I, § 15. "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v, Washington Legal Foundation,* 524

U.S. 156, 164,. 118 S.Ct. 1925, 1930, 141 L.Ed.2d 174, 183 (1998), quoting *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548,561 (1972).

Although defined by state law, a property interest is not subject to every whim and vagary of government. As the Supreme Court explained in *Webb's Fabulous Pharmacies,* 449 U.S. at 164, 101 S.Ct. at 452, 66 L.Ed.2d at 367, "a State, by *ipse dixit,* may not transform private properly into public property without compensation. "In other words, at least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips,* 524 U.S. at 167, 118 S.Ct. at 1931, 141 L.Ed.2d at 185. The transformation of private property into public property on a bare assertion of authority is "the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies,* 449 U.S. at 164, 101 S.Ct. at 452, 66 L.Ed.2d at 367.

Having decided that the dividends were private property, the question remains whether plaintiff and, if a *333 class is certified, other stockholders are entitled to compensation. The takings clause does not prohibit the taking of private property; rather, it prohibits the taking of private property without just compensation. In rejecting a takings clause claim in the context of clients' funds deposited by their attorneys into lawyers' trust accounts, the Supreme Court explained: "To recapitulate: It is neither unethical nor illegal for lawyers to deposit their clients' funds in a single bank account. A state law that requires client funds that could not otherwise generate net earnings for the client to be deposited in an IOLTA account is not a 'regulatory***638 taking.' A law that requires that the interest on those funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of 'just compensation' to the client. Because that compensation is measured by the owner's pecuniary loss-which is zero whenever the Washington law is obeyed-there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case." *Brown v. Legal Foundation*, 538 U.S. 216, 240, 123 S.Ct. 1406, 1421, 155 L.Ed.2d 376, 397 (2003).

The present case is before us on appeal from the grant of a motion to dismiss. Consequently, the record is incomplete. We agree with the appellate court that a remand is necessary for development of the facts in the circuit court and a determination of just compensation.

CONCLUSION

We stress that our opinion today is limited only to dividends accruing on stock held by the state under the Act. We hold that such dividends may not be taken by the state without just compensation to the owner. For the aforementioned reasons, the judgment of the appellate court is affirmed.

Appellate court judgment affirmed.

IN THE COURT OF COMMON PLEAS FRANKLIN COUNTY, OHIO

WILTON S. SOGG, Executor of the Estate of Julia Sogg individually, and on behalf of a class of others similarly situated, Plaintiff	)	Case No. 04-CVG08-8028
v.	)	Judge Frye
DOUG WHITE, Director, Ohio Department of Commerce, Defendant.	)	

OPINION

Frye, J

Introduction

This case concerns the unclaimed funds program operated, pursuant to statute, by the Division of Unclaimed Funds of the Ohio Department of Commerce. Plaintiff filed a claim as Executor of his mother's estate seeking to recover the $40 proceeds of an old insurance claim, plus stock dividends of $293. The state took custody of the insurance payment in 1989, and of the dividends in 1998. Defendant White is the current Director of the Department.

Before filing this suit Plaintiff recovered the principal amount of the two claims, plus interest earned between 1989 and July 26, 1991 on the insurance payment. However, the state paid no interest for the years after July 1991 on either the insurance claim or the stock dividends. In addition, the state deducted five percent of the amount returned to Plaintiff as a fee to cover administrative expenses. Seeking the interest accrued on those funds since July 1991, Plaintiff brought suit.

Practically speaking, unclaimed funds represent forgotten payroll checks, abandoned bank and brokerage accounts, down payments deposited with businesses, inheritances which heirs never knew existed, and the like. A recent Associated Press report states that all 50 states now operate unclaimed funds programs, and collected $22.8 billion in 2003.[1] Lawsuits similar to this one have been brought against unclaimed funds programs in several other jurisdictions.

Chapter 169 of the Ohio Revised Code sets out the legal rules under which unclaimed funds are collected and distributed by the Division of Unclaimed Funds. In July 1991 the relevant Ohio statute was amended to stop payment of interest by the state. Ohio law thus explicitly provides that "[i]nterest is not payable to claimants of unclaimed funds held by the state." R.C. 169.08(D).[2] That 1991 amendment also imposed a separate five percent administrative charge on funds returned to those filing a successful claim. Relying primarily upon several recent decisions of the United States Supreme Court and the time-honored rule that "interest follows the principal," Plaintiff seeks to invalidate this statute as an unconstitutional taking of interest earned on funds belonging to the public, but held for them by the state. Pending resolution of these motions the parties have' not addressed certification of a class action under Civ. R. 23.

Director White seeks dismissal of this suit. He argues this Court lacks subject matter jurisdiction, and that the Amended Complaint fails to state a claim upon which relief can be granted.

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[1] Doug Simpson, *State Governments Nationwide Reap Growing Caches of Unclaimed Cash*, The Daily Reporter, July 14, 2005 (citing figures from the National Association of Unclaimed Property Administrators.)

[2] Defendant observes that the Plaintiff has not explicitly challenged the constitutionality of R.C.169.05(A), which provides in part "[a]ny interest earned on money in the [unclaimed funds] trust fund shall be credited to the trust fund." Reply Memorandum of Defendant filed July 21, 2005, at p. 1, fn. 1. However, the Court sees this as merely a mechanical reiteration of the primary rule set forth in R.C. 169.08(D), which undeniably is challenged in this case.

The Unclaimed Funds Program in Ohio

Chapter 169 was originally adopted in September 1967, and became effective 90 days thereafter. The initial legislation, Am. Sub. Senate Bill No. 411, was similar to present law. Unclaimed funds, as defined then, were those that lay dormant for ten years. (Today the period is only five years.) Unclaimed funds in 1967 were to be reported to the Director of Commerce and after attempting notice to the owner ten percent of such funds were sent to the state, while the balance were to be invested by the holder with the interest paid to the state. Anyone claiming an ownership interest in unclaimed funds delivered or reported to the state could file a claim with the Director of Commerce, and "[n]o statute of limitations shall bar the allowance of a claim." Unlike present law, R.C. 169.08(D) provided in 1967 that an owner of funds whose claim was allowed by the Director would receive interest "computed at the rate earned by such funds during the period the director of commerce held the funds or at the rate agreed to by the holder and the owner, whichever is higher."

Thereafter a provision setting interest at the fixed rate of six percent was added to R.C. 169.08(D). That provision continued through several statutory amendments. *E..g.,* Sub. H.B. No. 201, 141 Ohio Laws 2005 (1985). However, in the 1991 biennial state budget bill, (Am Sub. H.B. No. 298, 144 Ohio Laws 4038,) the statute was significantly altered. Not only was the "interest is not payable" language added which is the focus of this suit, but also a five percent "fee for administering the funds" was assessed against any funds repaid to an owner. Uncodified Sections 151 and 194 of that 1991 budget bill make clear that these enactments occurred during a period of great revenue uncertainty for the state.

For present purposes the Court is entitled to accept as true the allegations in the Amended Complaint, filed May 24, 2005. Further, the Court takes judicial notice of comparable, but more complete, factual material about the Ohio unclaimed funds program published recently by Defendant White. It merits note that Paragraph 15 of the Amended Complaint asserts that the Defendant does, in fact, continue to pay interest earned before the 1991 statutory amendment became effective. As has always been true under Ohio law, unclaimed funds remain the property of the person having title to them throughout the time they are in state custody. That is, Ohio never treats the title to funds as abandoned, or demands an "escheat".[3] According to paragraph 17 of the Amended Complaint, Defendant paid 36,000 unclaimed funds claims totaling more than $40 million in fiscal year 2003.[4]

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[3] The recent news report mentioned at footnote one suggests that all 50 states treat unclaimed funds in the same manner, that is, as not escheating to any of the states.

[4] The Court takes judicial notice of up-to-date figures published by Defendant in the *Franklin County Unclaimed Fund$ Account$ 2005* [sic] report (complete with Mr. White's photograph and signature), distributed as an insert to The Columbus Dispatch in July 2005. "Currently, the division [of unclaimed funds] is holding 2.7 million accounts worth approximately $766 million." "More than 39,000 current or former Ohioans . . . shared in the more than $49 million paid by the Ohio Department of Commerce's Division of Unclaimed Funds. The average payment from the Division was $1,260 per claim!"

> "**How does the State use the money until it is claimed?** The State of Ohio acts to safeguard the citizens of Ohio by maintaining the funds reported to the Division until the rightful owner, or his or her heirs, have claimed the funds. Until claimed, the Ohio Department of Development uses the funds to invest in economic development initiatives throughout Ohio. To fund the operations of the division, a 5% administrative fee is applied to each paid claim."

(continued...)

Subject Matter Jurisdiction

In his Supplemental Memorandum Regarding Jurisdiction, at p. 1, "Plaintiff concedes that [the] question [of subject matter jurisdiction over a case of this kind] has never been directly addressed in any reported decision in Ohio." Defendant argues this Court lacks subject matter jurisdiction, and that this case may be heard only in the Court of Claims of Ohio.

The Amended Complaint makes five claims. Count I asserts a theory embraced in several recent Ohio Supreme Court decisions in which a state agency improperly held money that was actually owned by members of the public, and in which equitable restitution was the remedy granted. This remedy does not impose liability on the State or personally against any defendant, but merely restores to the actual owner the particular funds or property in the defendant's possession.[5] As such, it falls outside the purview of the Ohio Court of Claims.

Count II seeks a writ of mandamus under state law compelling Defendant White to institute an appropriation action with respect to the interest earnings of the Plaintiff, and other class members, on the premise that interest on unclaimed funds is private property which has been 'taken" since R.C. 169.08 was amended in 1991. Mandamus is an extraordinary remedy. For historical reasons, under Ohio law the writ has been

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[4] (...continued)

Defendant also reported that he maintains an on-line website, publishes the names of account owners in newspapers in all of Ohio's 88 counties, and uses other means to reach owners of funds.

[5] Defendant argues "funds must be clearly traceable before they are subject to restitution." Reply Memorandum filed July 21, 2005, p. 2. As the Amended Complaint makes clear, however, tracing is possible because the principal amount owed any individual owner is always known, and when necessary the Defendant can even "trace" funds in order to pay interest on them earned prior to 1991. Of course in other contexts interest is paid to adjust for the time value of money owed by the state. R.C. 163.17.

awarded to compel government to undertake formal condemnation proceedings, which in turn result in a jury trial valuing the private property found to have been taken. *E.g., Kermetz* v. *Cook-Johnson Realty Corp.* (10th Dist 1977), 54 Ohio App.2d 220, 227, 376 N.E.2d 1357. Count III seeks a declaratory judgment that the actual or constructive earnings on unclaimed funds in Ohio are private property, and that they have been taken for public use without payment of compensation as required by the Constitution of Ohio. Count IV makes the same claim under the United States Constitution. Finally, Count V seeks a remedy under 42 U.S.C. §1983, based upon an unconstitutional "taking" of property contrary to the Fifth and Fourteenth Amendments to the United States Constitution, together with an award of attorney fees under the Civil Rights Attorney Fees Act, 42 U.S.C. §1988.

"Subject matter jurisdiction is a court's power to hear and decide a case on the merits, [citations omitted] Jurisdiction does not relate to the *rights of the parties* but to the *power of the court,* [citations omitted] (emphasis in original)." *ABN AMRO Mortgage Group, Inc.* v. *Roush* (10th Dist.), 2005-Ohio-1763, 2005 WL 858182, at ¶47. "In a motion to dismiss for lack of subject-matter jurisdiction pursuant to Civ. R. 12(B)(1), the question is whether plaintiff alleges any cause of action the court has authority to decide." *Martin* v. *Mengel* (10th Dist.), 2005-Ohio-3684,2005 WL 1693638, at ¶5. Stated another way, this Court is limited to determining whether the Amended Complaint sets forth "any cause of action cognizable by the forum." *ABN AMRO Mortgage, supra,* at ¶48. Here, Plaintiff has alleged colorable claims within this Courts jurisdiction.

Count I seeks equitable restitution of funds wrongfully held by the state. Recent Ohio Supreme Court decisions make clear that such a claim need not be heard in the Court of Claims of Ohio even if the state is the defendant. *Santos v. Ohio Bur. of Workers' Compensation,* 101 Ohio St.3d 74, 2004-Ohio-28, syllabus. The second Count of the Amended Complaint seeks a writ of mandamus. *See, e.g., State ex rel Duncan* v. *Mentor City Council,* 105 Ohio St.3d 372, 2005-Ohio-2163, at ¶11. Once again, mandamus is a procedural remedy that was available against the state before the Ohio Court of Claims came into existence on January 1, 1975.[6] Declaratory judgments and injunctions were, likewise, available against the state in courts of common pleas. In formulating the jurisdiction of the Court of Claims, therefore, R.C. 2743.03(A)(2) reserved cases seeking "declaratory judgment, injunctive relief, or other equitable relief from the authority of that newly-created Court. In oral argument before this Court, Defendant's counsel acknowledged that this Court would unquestionably have subject matter jurisdiction over this suit if Plaintiff sought only an injunction or "strictly equitable relief." (Tr. of oral argument, cited by Plaintiffs Supplemental Mem., at p. 8, fn. 4.) The fact that Plaintiff seeks additional forms of relief in the alternative does not eliminate this Court's jurisdiction.

Counts III through V of the Amended Complaint seek relief premised on a violation of the "takings" clauses in the Ohio Constitution and the United States Constitution. Section 19, Article 1 of the Ohio Constitution provides that "[p]rivate property shall ever be held inviolate, but subservient to the public welfare.'[1] In approaching one recent takings case under this Ohio provision, Chief Justice Moyer began "by reaffirming the premise that the law does not favor forfeiture." *State ex rel. Pizza* v. *Rezcallah* (1998), 84 Ohio St.3d 116,131. R.C. 169.08(D) is, at least in some sense, nothing more than a forfeiture of interest to the state. As the *Pizza* decision recognized, the takings clause of the Ohio Constitution provides an independent basis for deciding a case, although the legal analysis used tracks closely the analysis given such a claim under the United States Constitution.[7]

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[6] Indeed, Defendant's Reply Memorandum filed July 21, 2005 appears to concede the point in stating "even if this Court technically has jurisdiction over Plaintiffs Counts I and II of his amended complaint, these counts fail to state a legally cognizable claim for relief."

[7] Equal protection and Due Process are other Ohio and federal (continued...)

Fifth Amendment protection against taking of property is made applicable to the states by the Fourteenth Amendment. *Kelo* v. *City of New London* (2005), 545 U.S., 125 S. Ct. 2655, 2658, note 1, and *Brown* v. *Legal Foundation of Washington* (2003), 538 U.S. 216, 232, note 6, both citing *Chicago, B. & Q. R. Co.* v. *Chicago,* (1897), 166 U.S. 226, 239. Beyond that, "the Fifth Amendment's requirement of just compensation forces the states to provide a judicial remedy in their *own* courts. The Constitution mandates the availability of effective remedies for "takings' . . . and accordingly requires courts to provide those remedies, 'the sovereign immunity States traditionally enjoy in their own courts notwithstanding.' [citations omitted]." v. *Commonwealth of Kentucky* (6th Cir. 2004), 381 F.3d 511, 527 *DLX, Inc.*. Moreover, Plaintiff's Count V seeks a remedy under 42 U.S.C. §1983. Ohio common pleas courts have concurrent subject matter jurisdiction with federal courts in §1983 actions. *State ex rel. Carter* v. *Schotten* (1994), 70 Ohio St.3d 89,92, m. 2; *Gumpl* v. *Bost* (12th Dist 1992), 81 Ohio App.3d 370, 374; *Wilson* v. *Patton* (4th Dist. 1988), 49 Ohio App.3d 150, 154-55. The Supreme Court recognizes the important role that state courts play in hearing federal claims in takings cases. *San Remo Hotel, L.P.* v. *City and County of San Francisco* (2005), 545 U.S. , 125 S.Ct 2491,2506-07.

Property rights protected by the state or federal Constitutions are created and defined not by those documents, but by independent sources such as state law. *Warren* v. *City of Athens* (6th Cir. 2005), 411 F.3d 697, 708. This case involves a right to interest earnings, which is intangible. However, Section 19, Article 1 of the Ohio Constitution requires compensation to be made for private property taken for public use, "'whether it be physical or merely deprives the owner of an intangible interest appurtenant

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[7] (...continued)

constitutional provisions viewed as "nearly identical" in their application. *Sorrell* v. *Thevenir* (1994), 69 Ohio St.3d 415,424; *Warren* v. *City of Athens, Ohio* (6th Cir. 2005), 411 F.3d 697,704, n. 6.

to the premises," *Lucas* v. *Carney* (1958), 167 Ohio St. 416,423 citing *Smith* v. *ErieRd. Co.* (1938), 134 Ohio St. 135, paragraph one of the syllabus. Accordingly, Ohio law recognizes a property right to interest as sought in this case.

Both Ohio law and federal constitutional law recognize the precept that "interest follows the principal." The constitutional question on the application of that simple phrase to the unclaimed funds held by Defendant primarily arises under decisions in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith* (1980), 449 U.S. 155; *Phillips* v. *Washington Legal Foundation* (1998), 524 U.S. 156; and *Brown, supra. Webb's Fabulous Pharmacies, Inc.* has been applied by two different appellate courts in Ohio to funds placed with the government for safekeeping. One case involved interest earned on the proceeds of a land appropriation; the other case arose from interest earned by the government on proceeds of an insurance policy interpleaded for distribution among multiple persons injured in an auto accident. *City of Akron* v. *Kalavity* (9th Dist, 2000), 2000 WL 141048; *West American Ins. Co. v. Dutt* (3rd Dist. 1990), 70 Ohio App.3d 422. Behind these recent cases protecting the right to recover interest lie older ones emphasizing the importance of interest as compensation for delay in payment. Landowners in Ohio are entitled to recover interest on the 'just compensation" they are awarded in eminent domain cases, and that entitlement arises from Section 19 of the Ohio Bill of Rights. R.C. 163.17; *State ex rel. Steubenville Ice Co. v. Merrell* (1934), 127 Ohio St. 453; *In re Appropriation of Easement* (4th Dist. 1960), 112 Ohio App. 269. There are, in short, genuine issues of state and federal constitutional law properly pleaded in this Amended Complaint concerning the validity of R.C. 169.08(D) as it has existed since July 1991 when the state eliminated the payment of interest and imposed the five percent administrative fee.

Although the Amended Complaint presents genuine constitutional claims, it is argued this case may be heard only in the Court of Claims. The intersection between the jurisdiction of a common pleas court and the Court of Claims is sometimes murky.

However, a substantial line of decisions holds that the Court of Claims lacks jurisdiction to consider cases premised upon violations of the Ohio or the United States Constitutions. *E.g., Howard v. Supreme Court of Ohio* (10th Dist.), 2005-Ohio-2130, 2005 WL 1022911, at ¶15. Similarly, "the Court of Claims has no jurisdiction over an action brought pursuant to Section 1983." *Burkey* v. *Southern Ohio Correctional Facility* (10th Dist. 1988), 38 Ohio App.3d 170.

Defendant relies upon *Estep* v. *Johnson* (10th Dist 1998), 123 Ohio App.3d 307, arguing it holds that only the Court of Claims has jurisdiction here. However, that case addressed very dissimilar facts. It arose from the impoundment of one vehicle by the Ohio State Highway Patrol, not a multi-million dollar program operated for decades through a separately constituted Division within state government. Furthermore, *Estep* did not claim any injury premised upon state agents following explicit statutory guidelines. The Court in *Estep* readily concluded that no conduct by the Highway Patrol gave rise to a colorable claim of an uncompensated taking, and therefore that Court's passing reference to an "exception" to the broad principal that "the Court of Claims has no jurisdiction over a claim of violation of rights under the United States or Ohio Constitutions," *Id.* at 316, must be confined to its facts.

Director White also argues that when the state has statutorily consented to be sued, it can limit the circumstances in which a suit may be brought. Spinning out this line of argument, he asserts the exclusive jurisdiction of the Court of Claims must be recognized in this case. However, the *Santos* decision, *supra,* demonstrates that the creation of the Court of Claims did not supercede the pre-existing jurisdiction of courts of common pleas.[8] In addition, the state is obligated to provide a remedy for federal constitutional "takings" claims under the line of federal decisions which includes *D[illegible], Inc., supra.* While a state "might well be empowered to limit the application of their own state constitutional protections to those instances in which state law provides specifically a means of recompense, surely plaintiffs federal right cannot be so easily circumscribed." *Lenoir v. Porters Creek Watershed Dist.* (6th Cir. 1978), 586 F.2d 1081, 1096.

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[8] The essential intent in creating the Court of Claims was to waive the state's sovereign immunity from liability and provide a new forum for hearing additional causes of action against the State comparable to those which could already be brought between private parties, such as breach of commercial contract, medical negligence, and auto (continued...)

For these reasons, the Court concludes that Ohio law does not restrict the Court's subject matter jurisdiction over either the state or federal questions raised in the Amended Complaint. The Motion to Dismiss premised upon Civ. R. 12(B)(1) is DENIED.

Statement of a Claim Upon Which Relief Can Be Granted

Pursuant to Civ. R. 12(B)(6), Director White also seeks dismissal of the Amended Complaint premised upon arguments that Plaintiff has stated no claim upon which relief can be granted. The Court first addresses Plaintiff's request for declaratory relief concerning the constitutionality of R.C. 169.08(D), which lies at the heart of this case. The Court will then address whether the request for a writ of mandamus appropriately remains a part of this case and, finally, the argument that the unclaimed funds program is a matter of legislative grace such that no owner of funds can possibly state a claim for interest.

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[8] (...continued)
accident cases. *Santos, supra.* Such cases had previously been addressed only administratively using a Sundry Claims Board, rather than using the state judiciary, because the waiver of immunity in an early-Twentieth Century amendment to the Constitution of Ohio had been held not to be self-executing, *e.g.*, *Krause* v. *State* (1972), 31 Ohio St.2d 132.

The Declaratory Judgment Claim

"There exist two reasons for dismissing a complaint for declaratory judgment; (1) no real controversy or justiciable issue exists between the parties or (2) the declaratory judgment will not terminate the uncertainty or controversy, per R.C. 2721.07." *Indiana Ins. Co.* v. *Forsmark* (9th Dist.), 160 Ohio App.3d 277, 2005-Ohio-1635, at ¶3. As with all motions brought under Civ. R. 12(B)(6), the well-pleaded allegations in the Amended Complaint must be accepted as true and liberally construed in favor of Plaintiff. Conclusions of law or unwarranted inferences cast in the form of factual allegations need not be accepted. The question under Civ. R. 12(B)(6) is limited to a determination of whether a plaintiff is entitled to offer evidence to support his or her claims, rather man whether the plaintiff ultimately will prevail on the merits. *E.g., Cincinnati* v. *Beretta U.S.A. Corp.*, 95 Ohio St.3d 416,2002-Ohio-2480, at ¶5.

Extrinsic evidence normally may not be considered in examining a complaint under Civ. R. 12(B)(6) unless it is in the form of an exhibit to the complaint, or the complaint itself refers to such evidence. However, as several judges of the Southern District of Ohio recently recognized, a "Court is entitled to 'consider public records, including court records in related cases,' without converting the motion to a motion for summary judgment. *See Jackson* v. *City of Columbus,* 67 F.Supp.2d 839,853 (S.D. Ohio 1998), overruled in part on other grounds, 194 F.3d 737 (6th Cir. 1999)." *Buckles v. Columbus Municipal Airport Auth.* (S.D. Ohio 2002), 2002 WL 193853, aff'd (6th Cir. 2004) 90 Fed. Appx. 927, (unpublished opinion). Thus, the Defendant's recently published "Unclaimed Fund$ Account$ 2005" report, footnote four, *supra,* can properly be considered for additional background consistent with Civ. R. 12(B)(6).

Liberally construing the Amended Complaint and other material properly before this Court in light of relevant precedents from the United States Supreme Court and several Ohio courts, Plaintiff has pleaded claims for declaratory and injunctive relief upon which relief could be granted. The recent decisions in *Kalavity, supra,* and *West America, supra,* **were based in part on the unconstitutionality of recovering double fees." 2000 WL 141048, at *2. The Amended Complaint in this case points out, of course, that Defendant imposes an administrative fee over and above retention of all interest earned. Plaintiff thus presents a ripe and potentially dispositive argument with respect to the constitutional validity of R.C 169.08(D).

The Mandamus Claim

Director White argues that Count II, in which Plaintiff seeks the remedy of a writ of mandamus to compel the institution of appropriation proceedings to compensate those who have allegedly been deprived of interest on their unclaimed funds, fails to state a claim upon which relief can be granted. The Director asserts his Department lacks eminent domain authority. Hence, he reasons, he cannot be ordered to undertake a condemnation action in this instance. Plaintiff does not dispute that the Department lacks express statutory authority to undertake condemnation. R.C. 121.02,121.04, and 121.08, reflect the duties of the Department involve intangibles, that is, matters such as the regulation of financial institutions, liquor control, and labor and worker safety inspections. Such duties are unlike those of other state departments which, from time to time, necessarily use eminent domain to acquire real property for parkland or highways in order to perform the public obligations for which they exist.

{^27} Ordinarily, "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Shemo* v. *Mayfield Hts.*, 95 Ohio St.3d 59, 63, 2002-Ohio-4905. However this procedure to compel the filing of a separate appropriation case arose in an earlier time. For much of our history state government was responsible for only a handful of obligations: making laws; collecting taxes; and building highways, canals or other public improvements. Quite often, mandamus was sought against state officers such as the Director of Highways (now the Director of Transportation) when state action impacted private real estate. Landowners, contending the highway department or another agency exceeded the bounds of title rights, were precluded from directly suing the state in tort by sovereign immunity. Secondarily, landowners were handicapped by restrictive venue statutes requiring any suit against a state officer to be filed in Columbus. Practically speaking, that deprived landowners in the other 87 counties of the state of a local jury even for takings cases not barred by immunity. Moreover, bureaucratic inertia sometimes delayed getting a state agency to begin condemnation and pay for real property already taken, absent the compulsion of a writ. Mandamus became an avenue to compel the institution of formal proceedings back home where the affected land was located, while preserving sovereign immunity in any action by a landowner directly seeking damages. By such indirect means through two legal actions, an owner's claim of a taking could be addressed and any compensation due could be adjudicated in a reasonably timely manner. *See, State ex rel. Wilson* v. *Preston* (1962), 173 Ohio St 203; *State ex rel. McKay* v. *Kauer* (1951), 156 Ohio St 347. paragraph three of the syllabus.

To be sure, over time the mandamus remedy has occasionally been employed to address new types of alleged "takings." Recent decisions by the Sixth Circuit Court of Appeals concluded, on one hand, that "[a]lthough mandamus is formally an extraordinary remedy, mandamus actions for this purpose have become routine in Ohio," *Buckles, supra;* while, on the other hand, this remedy in Ohio is seen as "confusing and uncertain at best." *Kruse* v. *Village of Chagrin Falls, Ohio* (6th Cir. 1996), 74 F.3d 694, 698. As Circuit Judge Batchelder observed in *Kruse,* [which as a decision recommended for full-text publication has greater value as precedent than *Buckles,* under 6th Cir. R. 28(g)] takings cases can become enmeshed in procedural technicalities bringing to mind *Jarndyce v. Jarndyce,* the Victorian equivalent of a Catch-22.

Where statutory authority to appropriate property exists, an order mandating that the officer who has caused a taking use R.C. Chapter 163 to convene a trial at which a jury may award compensation is sensible. After all, Chapter 163 answers a myriad of procedural questions, such as which side opens at trial and what happens if the government receives a jury verdict which, as in *Buckles, supra,* comes back so high that it would break the budget. However, lacking appropriation authority, the Director of Commerce is correct in concluding that a mandamus remedy should have no application in this case. Leaving aside the Director's lack of authority, one significant practical problem with a mandamus remedy is the sheer size of the group of potential fund-owners who would need to be sued if, hypothetically, a writ compelled Director White to begin condemnation cases. Are we to have separate condemnation cases for each of the 39,000 individual claimants who recovered funds last year and might be entitled to interest? Swamping Ohio's trial courts surely cannot be the correct answer. While a defendants' class action binding everyone arguably entitled to receive interest earned since July 1991 is theoretically possible as an alternative to individual lawsuits, that procedure offers no benefit not already available by allowing this case to proceed as presently pled. Beyond procedural questions, would there be any factual issue for a jury to decide in each individual condemnation case arising from the unclaimed funds law? This too appears unlikely, and if compensation were ordered trial would require no expert testimony -unlike the prototypical condemnation case in which appraisers opine on the value of property taken. The controversy here appears to require, at most, selection of an appropriate interest rate, if interest is due at all, and that is probably a question of law.

No case should become bogged down in difficult issues of process. Yet, that looms if this Court were to mandate that Director White commence condemnation proceedings. Leaving aside the delay inherent in Defendant's likely appeal of any writ of mandamus addressing his lack of eminent domain authority, the other difficulties noted suggest this procedure could spawn the *Jarndyce* of 21st century Ohio law.

There is an additional reason to jettison the mandamus claim at this juncture. Mandamus, like other "extraordinary remedies," is available only when usual forms of procedure are incapable of affording relief. *Levin* v. *City of Sheffield Lake* (1994), 70 Ohio

St.3d 104, 109. It is clear that where a §1983 remedy is available to fully and expeditiously redress federal constitutional claims, mandamus is unavailable under Ohio law. *State ex rel Carter, supra,* 70 Ohio St.3d, at 91-92, citing *Academy of Nursing Homes* v. *Barry* (1990), 56 Ohio St.3d 120, at 124. Although declaratory and injunctive remedies using §1983 cannot address Plaintiff's state takings claim, comparable declaratory and injunctive remedies, coupled potentially with restitution as discussed above, are available remedies without resort to mandamus. Since at least *City of Mansfield* v. *Balliett* (1902), 65 Ohio St. 451, paragraph three of the syllabus, Ohio law has recognized the remedy of an award of damages when a taking is proven under Section 19 of the Ohio Bill of Rights. While to be sure *Balliett* did not award damages against the state, it also did not hold that mandamus was the sole procedural remedy available to vindicate constitutional rights in such a circumstance.

Plaintiff's request for declaratory and injunctive relief coupled with restitution offers a practical, expeditious, and inexpensive route to address the merits of this dispute. Civ. R. 1(B) and innumerable decisions of the Supreme Court of Ohio strongly counsel such a straightforward approach to civil litigation, even when millions of dollars are at issue. Without resorting to a mandamus remedy, Plaintiff can be given any relief which he, or the class he proposes to represent, is entitled to receive. For these reasons, Director White's Motion to Dismiss Count II of the Amended Complaint, to the extent it seeks a remedy in mandamus, is GRANTED.

Plaintiffs State and Federal Constitutional Claims

Other than the mandamus portion of this case, the Court concludes Plaintiff's Amended Complaint raises issues of substance upon which relief can be granted under Ohio law. Similarly, in view of the foregoing discussion it cannot be said that the Amended Complaint fails to state a federal claim. "To survive a motion to dismiss a claim under 42 U.S.C. §1983, the plaintiff must properly allege two elements: (1) the defendant was acting under color of state law, and (2) the offending conduct deprived the plaintiff of rights secured under federal law." *Mezibov* v. *Allen* (6th Cir. 2005), 411 F.3d 712,716. The Amended Complaint satisfies both elements.

One other argument advanced by Defendant cuts across all of Plaintiff's claims and deserves brief discussion. It is argued that when the state gives back citizens' money as a matter of legislative grace, there can be no taking because any sovereign can declare abandoned property entirely forfeited. In the Indiana case raising essentially identical claims to those presented here, the Circuit Court of Marion County reached that conclusion. *Smyth* v. *Carter* (April 7, 2005), Case No. 49C01-0406-CT-001945. The simple answer to this proposition, at least for present purposes under Civ. R. 12(B)(6), is that the Ohio General Assembly did not enact a forfeiture statute. Perhaps conscious of the potential political fallout if they legislated that ill, elderly, careless or forgetful citizens should lose ownership of millions of dollars a year, the Ohio legislature accepted the premise that unclaimed funds always remain the property of the owner. That premise was used when Ohio's program began in the 1960s. That concept persists today. Accordingly, the fact that the state might have legislated differently, and provided that no owner could recover property once it was lost for some fixed period of years after which title escheated to state government, does not inevitably mean that the unclaimed funds system which Ohio actually did adopt is constitutional. "[J]ust compensation is not to be measured by what would have happened in a hypothetical world." *Brown* v. *Legal Foundation of Washington, supra,* 538 U.S. at 245 (Scalia, J. for himself, Rehnquist, C.J., Kennedy, and Thomas, JJ, dissenting.)

Thus, the balance of the Motion to Dismiss pursuant to Civ. R. 12(B)(6) is **DENIED**.

IT IS SO ORDERED.

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Court of Common Pleas of Ohio,

Franklin County. SOGG, Exr., et al., Plaintiffs,

v.

WHITE, Defendant.

No. 04CVG-08-8028.

Decided Aug. 7, 2006.

Futterman, Howard, Watkins, Wylie & Ashley, Chartered, John R. Wylie, and Charles R. Watkins; Susman, Heffner, & Hurst, L.L.P., and Arthur T. Susman; Thompson Hine L.L.P., William C. Wilkinson, and Craig A. Calcaterra, Columbus, for plaintiff.

Jim Petro, Attorney General, and William J. Cole and John T. Williams, Assistant Attorneys General, for defendant.

RICHARD A. FRYE, Judge.

Introduction

This case was certified as a class action under Civ.R. 23(B)(2), in order to determine whether a portion of Ohio's Unclaimed Funds Act is unconstitutional because it results in a taking of private property. Amended in 1991 as a significant alteration to the state's program for handling unclaimed funds that began in the 1960s, the statute in question denies private owners of funds any interest on their money while it is held by the state even though, while in state custody, the funds always remain private property. Beyond retaining the interest earnings, the state also collects a five-percent administrative fee upon funds returned to private owners. Interest earned on the tens of millions of dollars returned to private owners each year [FN1] is taken by the state to underwrite loans to first-time homebuyers and to be used for other public purposes. For the reasons explained hereinafter, this court concludes that the federal and state Constitutions both require the state to pay interest on unclaimed funds held by the defendant and that the first sentence of R.C. 169.08(D) as amended in 1991 is unconstitutional.

The Factual Record [FN2]

Wilton Sogg is the executor of his mother's estate. Julia Sogg passed away, leaving unclaimed funds composed of an insurance policy claim payment of $40.52, reported to the defendant in 1989 by Blue Cross and Blue Shield, plus dividends of $292.86, reported in 1998 by the Bank of New York. Early in 2004, Mr. Sogg made a claim for those funds. A few months later, the state issued a check for $320.72. The plaintiff was paid interest on his mother's Blue Cross and Blue Shield money calculated until July 26, 1991, when the applicable statute was amended to eliminate payment of interest. For the period after that date, the plaintiff received no interest. In addition, a five-percent fee was deducted from the amount returned to cover the defendant's administrative costs. Mr. Sogg brought suit in August 2004.

Mr. Sogg was certified under Civ.R. 23(B)(2) as a class representative for all those who have recovered unclaimed funds since August 4, 2000, and who were not paid interest on their funds after July 1991. Class Certification Order filed February 24, 2006. In a separate decision, the court determined that a four-year statute of limitations is applicable under Ohio law and under 42 U.S.C. 1983 to the "takings" claims made in this case. Thus, claims by those whose unclaimed funds had been repaid prior to August 4, 2000 (although without interest attributable to the period after July 26, 1991) were time-barred. Their legal injury manifested itself more than four years before this suit began.

Doug White is Director of the Ohio Department of Commerce. He supervises the Division of Unclaimed Funds (the "division") within the Ohio Department of Commerce. The division operates an elaborate program to gather funds, keep track of them, and advertise publicly to alert owners that their property is in state custody. According to the recent news release referenced at footnote one, outreach efforts include kiosks at the Ohio State Fair that connect directly to the division's "Online Treasure Hunt" website. Using those computer terminals, the public can determine whether their names are associated with any of the 3.2 million open accounts still waiting to be claimed. R.C. 169 sets forth the procedure under which unclaimed funds are collected and distributed by the division. Ohio first adopted the Unclaimed Funds Act (the "Act") in 1967. From fiscal year 1968 through fiscal year 2005, the state controlled almost $1.3 billion as unclaimed property. Over the entire period, the program successfully returned 35 percent of the property to its owners.

For the first several decades, this program paid interest to owners upon the return of their money. However, a July 1991 amendment to R.C. 169.08(D) eliminated payment of all interest. The statute now explicitly provides, "Interest is not payable to claimants of unclaimed funds held by the state." R.C. 169.08(D). Beyond that, and of legal significance as discussed below, since 1991, the defendant has been statutorily authorized to, and actually does, collect a five-percent administrative charge measured against funds returned to successful claimants.

The purpose of the Ohio Unclaimed Funds Act is threefold: (1) to protect the property right of the owner and reunite the owner with his or her funds, (2) to provide a centralized contact for potential unclaimed funds owners, and (3) to relieve holders of unclaimed funds from further legal liability. Under Ohio law, money, rights to the money and intangible property are classified as "unclaimed" when the owner has not generated activity for a prescribed period-generally five years, depending upon the type of property— and when the nonowner "holder" of such property cannot locate the owner. All funds that meet the statutory definition of "unclaimed" are placed under the division's control. "Holders" of unclaimed funds may, in the division's discretion, remit ten percent and retain 90 percent of the unclaimed funds. In instances such as these, R.C. 169.05 requires the holder to invest the retained amount into an approved FDIC-insured "income-bearing" account or a U.S. treasury account. The holder is then required to deliver over all earnings realized on such invested funds to the division.

Marketable securities and other intangible, nonmonetary property delivered into the defendant's custody are sold and converted into cash in accordance with R.C. 169.05(A). Further, while the Act does not specifically address tangible items, the division also accepts custody of property left behind in safe-deposit boxes, such as stamp and coin collections. The division inventories the items and establishes accounts for the owners. Tangible items are kept intact until such time as the division elects to liquidate them at auction. The last such auction was held in 1998. Once the items are liquidated, the division treats the proceeds like all other unclaimed funds.

The division holds unclaimed funds in trust for the owner in perpetuity. Funds and other property never escheat or otherwise become property of the state of Ohio. Concepts of "abandonment" or "escheat" are not a part of the Ohio statutory scheme.

Funds held by the division are not permitted to sit idle. Many of the funds are actually invested by the state (or by another holder) to accrue interest or other earnings that is eventually paid to the state. Interest-bearing accounts contain the principal funds that are held by the defendant, including the ten percent funds not retained by holders outside state government and the interest paid in to the state that is earned on the 90 percent of funds that the state may elect to leave in private hands. Beyond those income-bearing accounts, a substantial amount of unclaimed money is transferred to finance state programs such as the Ohio Housing Finance Authority ("OHFA"), which obtained $570 million from the pool of unclaimed funds between state fiscal years 1991 and 2005. Those funds were then loaned out to the public at interest to support housing development in the state. Money so utilized remains subject to recall to repay claims of owners. However, even if the OHFA remits the principal back to the division, it never remits any interest received from home loans that the OHFA has made using the unclaimed funds.

The defendant accounts for operation of the division using three major expense categories: operating expenses, administrative and computer support, and holder mailing and other expenses. Operating expenses include payroll, external auditors, advertising, and equipment. Between fiscal years 1992 and 2005, the division showed expenses of $74.5 million, exclusive of amounts transferred to Ohio's General Revenue Fund. Transfers to the General Revenue Fund of the state are accounted for, within the division, as monetary losses. Between fiscal years 1992 and 2005, as the offset to expenses, unclaimed property held by the division earned $73 million. This figure is, however, exclusive of earnings constructively realized on the hundreds of millions of dollars transferred to the OHFA and to other state programs as well. Using its own peculiar form of bookkeeping, the division asserts that it operated at a net loss of $1,466,789 since fiscal 1992.

Insofar as earnings on unclaimed funds are concerned, the division's accounting is materially inconsistent with Generally Accepted Accounting Principles ("GAAP") or any other sensible accounting standards. The system used artificially ignores earnings realized from funds transferred to the OHFA simply because, somewhere along the way, someone in authority decided that the OHFA need not account for or pay over the interest it earns on home loans made using unclaimed funds. As of June 30, 2005, the OHFA had returned $316 million to the division. Interest earnings should be imputed to that $316 million, and for many of those years, the statutory interest rate in Ohio was ten percent. Beyond the OHFA, unclaimed funds have also been transferred to the Savings and Loan Assurance Corporation, the Ohio Job Development Fund, and the state General Fund. However, unclaimed funds transferred to destinations other than the OHFA never are returned to the defendant and, not surprisingly, no interest earnings ever are remitted or credited to the division. Furthermore, additional unclaimed funds are held by the state treasurer at interest to be used to pay approved claims and operating expenses. Since June 2005, no such interest from the treasurer's account is either remitted or credited to the division.

Between July 1, 2000, and June 30, 2005, just the unclaimed funds retained within the division earned $29,074,394. Above and beyond that, the $9,002,403 was realized as proceeds of the five-percent claim processing fee. Expenses claimed by the defendant for fiscal years 2004 and 2005 are aberrational. [FN3] Leaving those years aside, total operating expenses averaged approximately $5.6 million. Interest on just the unclaimed funds retained within the division plus the five-percent fee generated $7.6 million per year.

Notwithstanding difficulties attributable to state accounting practices that systematically underreport earnings attributable to unclaimed funds (thereby obscuring the true cost of the OHFA and other public programs using such funds interest-free), the division does not operate even close to a financial loss. If GAAP accounting were employed, accurate figures would be readily available. Yet, for the purpose of this opinion, the evidence supports a finding beyond a reasonable doubt that the Ohio unclaimed funds program makes substantial profit for the state. Indeed, it is a veritable cash cow feeding an array of other public programs.

Private Property in Unclaimed Funds

In a takings case under either the state or federal Constitution, the first question is whether private property is implicated. In this case, it is undisputed that unclaimed funds held by Ohio always remain the property of the private owner.

That being true, the issue becomes whether interest earned on those funds while in the control of state government is also the property of the private owner. The basic rule that "interest follows principal" offers at least a partial answer to this question. That rule is of long standing but retains current vitality. The Supreme Court of the United States recently recognized that the rule that " 'interest follows principal' has been established under English common law since at least the mid-1700's." *Phillips v. Washington Legal Found.* (1998), 524 U.S. 156, 165, 118

S.Ct. 1925, 141 L.Ed.2d 174. Furthermore, "this rule has become embedded in the common law of the various States." Id. and fn. 5. Ohio is among those states. The defendant concedes that "Ohio generally recognizes the common law doctrine of 'interest follows principal.' " Ohio has long recognized this rule. E.g., *City of Ohio v. Cleveland & Toledo RR. Co.* (1856), 6 Ohio St. 489, 494-495. The tenet that interest follows principal remains in place today. *Thompson* v. *Indus. Comm.* (1982), 1 Ohio St.3d 244, 249, 1 OBR 265, 438 N.E.2d 1167; *Akron* v. *Kalavity* (Feb. 2, 2000), Summit App. No 19678, 2000 WL 141048 (in eminent domain case, interest earned while funds deposited less customary clerk's fees belonged to the landowners). More generally, the rule that interest should be paid on principal sums due is recognized in Ohio statutes. E.g., R.C. 1343.03 (assessing pre- and postjudgment interest on legal claims).

As a corollary to "interest follows principal," it is said, generally speaking, that interest generated from private funds belongs to the owner of the principal even when the money is held in an account mandated by the government. *Phillips,* supra, at 172, 118 S.Ct. 1925, 141 L.Ed.2d 174; *Kalavity,* supra. The question then becomes whether the Unclaimed Funds Act in Ohio mandates a different rule of property law.

The 1991 amendment to R.C. 169.08(D) provided that "[i]nterest is not payable to claimants of unclaimed funds held by the state." Plainly, this statute is limited in scope. It did not purport to repeal the common-law recognition that "interest follows principal." Of course, the Ohio Supreme Court has recognized that the General Assembly may sometimes abrogate common-law principles through legislation. *Thompson,* supra, 1 Ohio St.3d at 249, 1 OBR 265, 438 N.E.2d 1167, citing *Eshelby v. Cincinnati Bd. of Edn.* (1902), 66 Ohio St. 71, 74, 63 N.E. 586. But, as the defendant concedes, *Thompson* "does not mean that the General Assembly may legislate away existing property rights." The Constitution places limits on how a state may tinker with established rights of private property.

"The Takings Clause protects private property; it does not create it. * * * Even though fundamental principles of State property law may define property rights, the Takings Clause nevertheless limits a State's authority to redefine preexisting property rights. Thus, 'a State, by *ipse dixit,* may not transform private property into public property without compensation[1] * * * nor can it 'sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.' " *Washlefske v. Winston* (C.A.4, 2000), 234 F.3d 179, 183-84, quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980), 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358, and *Phillips,* 524 *U.S.* at 167, 118 S.Ct. 1925, 141 L.Ed.2d 174. "The States' power vis-a-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer 'new property' status on interests located outside the core of constitutionally protected property, but they *may not* encroach upon traditional 'old property' interests found within the core. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies,* 93 Colum.L.Rev. 309, 329 (1993). Were the rule otherwise, States could unilaterally dictate the content of-indeed, altogether opt out of-both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts." (Emphasis sic.) *Schneider v. California Dept. of Corr.* (C.A.9, 1998), 151 F.3d 1194, 1200-1201; subsequent opinion at 345 F.3d 716 (2003). *McIntyre v. Bayer*

(C.A.9, 2003), 339 F.3d 1097, followed *Schneider* and observed that "constitutionally protected property rights can—and often do— exist *despite* statutes that appear to deny their existence." Id. at 1100, fn. 5.

Consistent with the logic of these decisions, the court cannot readily accept the state's argument that the General Assembly retained broad authority in 1991 to redefine interest on unclaimed funds as something other than private property. In considering this question, it is noteworthy that the 1991 amendment to R.C. 169.08 both altered a longtime rule of common law *and* completely reversed the prior version of the same statute that *had* mandated payment of interest on unclaimed funds held by the state. R.C. 169.08(D) provided in 1967 that an owner of funds whose claim was allowed by the Director *would* receive interest "computed at the rate earned by such funds during the period the director of commerce held the funds or at the rate agreed to by the holder and the owner, whichever is higher." Thereafter, a provision setting interest at the fixed rate of six percent was added to R.C. 169.08(D). That provision continued through several statutory amendments. E.g., Sub.H.B. No. 201, 141 Ohio Laws 2005 (1985). Finally, in the 1991 biennial state budget bill (Am.Sub.H.B. No. 298, 144 Ohio Laws 4038), the right to any interest was abruptly eliminated. Not only was the "interest is not payable" language added, which is the primary focus of this suit, but also a five-percent "fee for administering the funds" was introduced for the first time to be assessed against any funds repaid to an owner. Uncodifted Sections 151 and 194 of that 1991 budget bill make it abundantly clear that those enactments occurred during a period of great revenue uncertainty for the state of Ohio, although standing alone, this historical fact is of no more constitutional importance than the presumed social benefit derived from subsidizing housing loans.

For these reasons, the court holds that the common-law rule of property law that "interest follows principal" was not subject to legislative repeal in 1991 as it pertains to the unclaimed funds statutes. Accordingly, because private property is implicated, the court turns to the federal and state takings claims made on behalf of the plaintiff class.

Takings Actionable under the United States Constitution

Counts IV and V of the amended complaint set out federal "takings" claims. Count V specifically relies upon 42 U.S.C. 1983, the federal civil-rights statute providing a remedy for constitutional violations occurring under color of state law. The Takings Clause of the Fifth Amendment has been applicable to the states, through the Fourteenth Amendment, since *Chicago, Burlington & Quincy RR. Co. v. Chicago* (1897), 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979. *Kelo* v. *New London* (2005), 545 U.S. 469, 125 S.Ct. 2655, 2658, 162L.Ed.2d439, fn. 1.

"The Takings Clause of the Fifth Amendment provides that private property shall not 'be taken for public use, without just compensation. U.S. Const. Amend. V. This restraint on the power of the government to take private property * * * is 'designed to bar [the government] from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Penn Central Transp. Co.* v. *City of New York* (1978), 438 U.S. 104, 123 [98 S.Ct. 2646, 57 L.Ed.2d 631] (1978)." *Prater* v. *Burnside* (C.A.6, 2002), 289 F.3d 417,424.

The United States Supreme Court has consistently recognized that the act of separating interest from the principal that earned it, when done by a state or political subdivision, may constitute a taking of property for constitutional purposes. *Brown* v. *Legal Found., of Washington* (2003), 538 U.S. 216, 235, 123 S.Ct. 1406, 155 L.Ed.2d 376; *Phillips,* 524 U.S. at 168, 118 S.Ct. 1925, 141 L.Ed.2d 174; *Webb's,* 449 U.S. at 164-65, 101 S.Ct. 446, 66 L.Ed.2d 358. Moreover, *Brown* clarified that the straightforward application of per se legal rules is the appropriate method of analysis in a case like this one, in which interest is taken by the government. *Brown,* supra, at 233-235, 123 S.Ct. 1406, 155 L.Ed.2d 376. This case is not one in which the alternative legal analysis in takings cases, requiring "complex factual assessments of the purposes and economic effects of government actions," such as is used to evaluate the constitutionality of zoning or other government regulatory action, is appropriate. Id. at 234, 123 S.Ct. 1406, 155 L.Ed.2d 376; see, also, *Schneider,* supra, 345 F.3d at 720.

The defendant concedes that interest generally follows principal, but postulates several reasons why that common-law rule is inapplicable to funds held in trust by the division. First, it is argued that the plaintiffs have no right to interest on the unclaimed funds because the General Assembly abrogated the common-law rule that interest follows principal as it pertains to unclaimed funds when it amended R.C. 169.08(D) on July 26, 1991. That argument has been rejected above. Second, the Director argues that since unclaimed funds are essentially "abandoned," the owners of those funds no longer enjoy any right to their funds, much less to interest accrued thereon. Third, the defendant claims that plaintiffs are not entitled to compensation because they suffered no pecuniary loss, in that without the unclaimed funds program, all interest would be lost on these funds. Fourth, the state contends that it is not liable because the amount that the division retains from the interest on unclaimed funds does not meet the division's administrative costs. That argument fails based upon the factual record, as already discussed. The remaining arguments will be separately examined.

Unclaimed Property in Ohio Is Not "Abandoned"

The defendant argues that common-law principles of escheat or abandonment apply and supplies ample legal authority to seize unclaimed funds in their entirety. Hence, it is said, that same sovereign power necessarily includes the lesser power to retain just the interest generated by unclaimed funds. The defendant suggests that the legislature's definition of "unclaimed funds" is tantamount to a definition of abandoned property subject to escheat. From this, he reasons, all the old common-law legal rules applicable to owners who truly abandon property are determinative here.

It is well established at common law that sovereign states have the power to take custody of or assume title to abandoned personal property as bona vacantia, through a process commonly called escheat. *Delaware v. New York* (1993), 507 U.S. 490, 497, 113 S.Ct. 1550, 123 L.Ed.2d 211; see, also, *Smyth v. Carter* **(Ind.App. 4th Dist, 2006), 845 N.E.2d 219, 222** (addressing a takings claim under Indiana's unclaimed funds program). When considering a state's power of escheat, one must look to the law that creates the property right and binds others to honor it. *Delaware* v. *New York,* at 501, 113 S.Ct. 1550, 123 L.Ed.2d 211.

The unclaimed funds statutes, rather than the general common law of abandonment or escheat, must be consulted to determine whether the defendant may assert abandonment with respect to unclaimed funds. The Ohio statutes so comprehensively regulate the defendant's operation of the program that it cannot be thought that the legislature left such an important matter outside the Code. Thus, notwithstanding the defendant's attempt to straddle the proverbial line by stating in ¶ 12 of his Amended Answer that the Ohio unclaimed funds law "is not strictly an escheat statute," one must turn to the statutes to determine if "escheat" or any related doctrine genuinely is applicable.

The notion of an "escheat" based upon an "abandonment" of private property runs contrary to the language of the Unclaimed Funds Act, as well as division operations under the Act for nearly forty years. The Unclaimed Funds Act does not define unclaimed funds as "abandoned" property at all. R.C. 169.01 (B) and 169.02 define the term "unclaimed funds." Neither refers to funds for which Ohio asserts jurisdiction as "abandoned" property. On the other hand, in referring to unclaimed funds programs operated in other states, the Ohio law specifically recognizes the concepts of escheat and abandonment. Funds will not be considered unclaimed funds under Ohio law "if they may be claimed as unclaimed, abandoned, or escheated funds under the laws of such other state." R.C. 169.04(A). This wording plainly shows that the drafters recognized a distinction between "unclaimed," "abandoned," and "escheated" funds. The absence of the words "abandoned" and "escheated" elsewhere in the Act cannot be attributed to mere inadvertence. Therefore, the statutory language actually written does *not support* the defendant's argument that this is merely a disguised form of "abandoned" property program.

Viewing the unclaimed funds statutes as, in substance, addressed to funds subjected to a form of "forfeiture" to the government would also be contrary to the stated purposes of the Act, which are (1) to protect the property right of the owner and reunite the owner with the funds, (2) to provide a centralized location of contact for potential unclaimed funds owners, and (3) to relieve holders of unclaimed funds turned over to the state from further legal liability for the property. The defendant's argument that funds administered by the defendant are not truly private property also contradicts public statements by the defendant in operating this program. Nowhere is it said that unclaimed funds have been forfeited or no longer are private property, much less is it suggested that title to a part of the funds has become vested in state government. Nothing, even by implication, would lead a reasonable observer to the conclusion that unclaimed funds ever escheat to Ohio. The "Frequently Asked Questions" and answers posted on the defendant's official website prove beyond a reasonable doubt that this is not a forfeiture program or one grounded in the concept of escheat.

Pragmatic reasons also support the conclusion that the General Assembly did not enact a forfeiture statute. Passage of legislation that would work a forfeiture of millions of dollars each year, and under which ill, elderly, careless, or forgetful Ohio citizens would simply lose their property to the state forever would be of broad public concern. There is no evidence before the court suggesting that any such apprehension arose from the 1991 amendment to the unclaimed funds statute. It is far more sensible to read the entire body of related unclaimed funds statutes as they were written and consistently administered since Ohio's program began in the 1960s: funds remain private property forever while in state hands. Property is never treated as abandoned or forfeited. R.C. 169.08(D) cannot be understood to passively cause that result.

The defendant relies upon the Indiana appellate decision announced earlier this year in *Smyth, supra,* Ind.App.

4th Dist., 2006. That court held that although the common-law maxim "interest follows principal" is recognized in Indiana, the maxim did "not apply where an owner's actions cause the loss of rights of ownership." Id. at **223.** Under Indiana's version of the unclaimed funds law, such property is "presumed abandoned." Id. at **222,** quoting portions of the Indiana Code. This, in turn, indicated to that court that "an owner's failure to exercise his or her right of possession results in a presumption that the property has been abandoned" so that the state has plenary power over it, including the right to retain interest earnings. Id. at **223.** The Ohio act operates differently. Nothing in Ohio law "presumes" abandonment of title. Accordingly, *Smyth* is not relevant to the takings claims addressed to R.C. 169.08(D).

Certainly one could argue that Ohio *might* have legislated differently. Perhaps, like Indiana, Ohio could provide that no owner could recover their property once it fell into state hands. Yet, to acknowledge that legislative authority may exist to create a system of property rights in which unclaimed funds are treated as abandoned, with title to escheat to the state, does not mean that the different system actually created in Ohio works the same way, the 1991 amendment to R.C. 169.08(D) notwithstanding. For present purposes, this court must concentrate on what was adopted by the General Assembly. "[J]ust compensation is not to be measured by what would have happened in a hypothetical world." *Brown,* supra, 538 U.S. at 245, 123 S.Ct. 1406, 155 L.Ed.2d 376 (Scalia, J., Rehnquist, C.J., Kennedy, and Thomas, JJ., dissenting).

Do Plaintiffs Suffer a Property Loss for Constitutional Purposes?

The defendant next argues that but for the Unclaimed Funds Act, interest could never accrue on unclaimed funds, so that although a taking of property may occur, there is no compensation due. In *Brown,* 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376, and *Phillips,* 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174, the United States Supreme Court grappled with the appropriate constitutional analysis to apply when government takes property, generates interest earnings with it, but then retains those earnings. Both decisions were decided by five-to-four votes. Both addressed Interest on Lawyers Trust Account ("IOLTA") systems adopted across the nation. The factual premise for IOLTA is simple yet essential to an understanding of the ultimate outcome in these two recent decisions. All lawyers in private practice have, from time to time, client funds in their possession. Under longstanding practice, lawyers are expected to maintain clients' money separate from *their* own. Beyond this, statutory mandates in R.C. 4705 and in rules for the bar, including Disciplinary Rule 9-102(E)(1), require use of IOLTA accounts. Such accounts pool insubstantial sums of client money until the funds are disbursed, or hold larger amounts of money for insubstantial periods of time. In either event, the premise is that absent pooling with similar funds belonging to clients of other lawyers, there would be no interest earnings that could ever be meaningful, and that would exceed the expense of opening separate bank trust accounts (with related record keeping) for each specific client having even a small amount of money. Interest earned on pooled IOLTA funds is then siphoned off. In Ohio, those earnings directly support the Ohio Legal Assistance Foundation. It, in turn, financially supports the Legal Aid Society of Columbus and comparable organizations serving low-income residents across the state. Given these facts, the Supreme Court of the United States concluded in 2003 in *Brown,* supra, that while a "taking" of property (the interest) occurs with IOLTA accounts, there is no net loss to the property owner. This is because, by definition, funds in IOLTA accounts would never have earned any interest without the pooling arrangement mandated by these programs. A "taking" requires not only that property be devoted to "public use" [FN4] but also that "just compensation" be due the owner. Under the facts in *Brown,* there simply was no pecuniary loss to the owner triggering any right to just compensation. The Supreme Court reaffirmed Justice Holmes' observation that "the question is what has the owner lost, not what has the taker gained." *Brown,* at 236, 123 S.Ct. 1406, 155 L.Ed.2d 376, quoting *Boston Chamber of Commerce v. Boston* (1910), 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725.

Absent a pecuniary loss, there is no violation of the Takings Clause. *Brown,* 538 U.S. at 235, 123 S.Ct. 1406, 155 L.Ed.2d 376. However, that holding from *Brown* does not assist the defendant. Here, the record shows that unlike the facts before the Supreme Court in the IOLTA litigation, unclaimed funds managed by the defendant are not trifling in amount. The average amount of money returned to successful claimants since fiscal year 1992 (when the statute eliminated payment of interest) has been $1,010. Furthermore, Ohio's Act affords particularized attention to unclaimed accounts worth $50 dollars or more, an amount of money that, despite inflation, remains meaningful to the legislature and that is capable of generating some interest if held for any duration. See R.C. 169.03(A)(2) and (D). As was true with the property of Julia Sogg, furthermore, unclaimed funds appear to remain under the division's control for substantial periods of time. Since fiscal year 1992, over $1 billion in unclaimed funds have been reported to or deposited with the division, but over that recent period, only $381 million (or 36 percent) have been paid out. Viewed more broadly, beyond a reasonable doubt, the unclaimed funds program generates millions of dollars in net interest each year that is simply expropriated by the state. Restitution is therefore due the class of property owners represented by Mr. Sogg based upon the value of interest earned on each individual account retained by the division. See *Brown*, supra, 538 U.S. at 239, fn. 10, 123 S.Ct. 1406, 155 L.Ed.2d 376

Brown, supra, and *Leider v. United States* (C.A.Fed., 2002), 301 F.3d 1290 are argued for the proposition that Ohio has no duty to either hold unclaimed funds for owners or to create an arrangement under which funds accrue interest. *Brown* has already been discussed at length. The facts in *Leider* were that a creditor was owed a distributive share of a bankruptcy settlement. When the bankruptcy court was unable to locate him, it deposited the money in the United States Treasury as unclaimed funds, which earned no interest. When Leider finally received his pay-out, he sued for interest relying on the Takings Clause of the Fifth Amendment and the "interest follows principal" rule. In rejecting that claim, the Federal Circuit recognized that since Leider's funds never were invested by the government, no interest could follow the principal. *Leider,* 301 F.3d at 1296. *Leider* also relied upon an earlier decision in *United States Shoe Corp. v. United States* (C.A.Fed., 2002), 296 F.3d 1378, 1384, holding "that 'for the accrued interest to rise to the level of private property, the principal must be held in an identified private account.' " *Leider* at 1297, fn. 5, quoting *United States Shoe* at 1384.

In contrast, Ohio explicitly provides that unclaimed funds will be maintained in identifiable private accounts. R.C. 169.03(A)(2). Ohio law plainly recognizes that interest will be earned on unclaimed funds while in the defendant's possession. For instance, R.C. 169.05(A) provides that upon the funds' actual transfer to the state, the Director may either forward the funds over to the state Treasury or place them in a financial institution, whereupon "[a]ny interest earned on money * * * shall be credited to the [unclaimed funds] trust fund." Furthermore, unclaimed funds are always intended to be returned to their rightful owners. Thus, the *Leider* holding was based upon factual circumstances unlike those presented here (and in *Webb's,* supra, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358) and is not relevant in deciding this case.

The Effect of the Five-Percent Fee

The defendant's arguments also overlook the constitutional significance of the five-percent administrative fee that the defendant collects. R.C. 169.08(D) provides, "The director shall retain * * * as a fee for administering the funds, five per cent of the total amount of unclaimed funds payable to the claimant." Between fiscal years 1992 and 2005, this fee yielded $15,621,288.

Webb's, supra, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358, was a unanimous decision of the Supreme Court announced in 1980. It addressed money interpleaded into a court pending the outcome of a lawsuit. Florida took an administrative fee and also kept the interest earned on the funds. Recognizing that there was a property right in the interest earnings, and the rule that interest follows the principal, the Supreme Court held that "where there is a separate and distinct state statute authorizing a * * * fee 'for services rendered' based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the * * * [government's control] is required by state statute," the retention of interest earned over and above the fee was "a taking violative of the Fifth and Fourteenth Amendments." *Webb's,* at 164-65, 101 S.Ct. 446, 66 L.Ed.2d 358. The Court in *Webb's* expressed no view on the constitutionality of a statute under which retention of interest earned would be the only return to the government but, as noted already, this case is exactly like *Webb's* in that both a five-percent administrative fee and retention of interest earnings occurs.

Consistent with *Webb's,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358, it is unconstitutional for the defendant to retain interest on unclaimed funds when the Unclaimed Funds Act already provides a specific five-percent administrative fee for the services given to owners of unclaimed funds. While *Webb's* left open a decision on whether interest could be retained in the absence of an administrative fee or if the government program was operating at a loss, those questions are not pertinent here. The claimed poverty of the division reflects nothing more than creative bookkeeping. The General Assembly's decision to use the division's coffers like a piggybank runs afoul of *Webb's,* supra: "[T]he exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using * * * [the Division of Unclaimed Funds]. Indeed, 'the Fifth Amendment's guarantee was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " Id. at 163, 101 S.Ct. 446, 66 L.Ed.2d 358, quoting *Armstrong v. United States* (1960), 364 U.S. 40, 49, 80 S.Ct. 1563, 1569,4L.Ed.2d 1554.'

Accordingly, the court finds and declares that the nonpayment of interest on unclaimed funds and the further enforcement of the first sentence of R.C. 169.08(D), as amended in July 1991, violate the Fifth Amendment of the United States Constitution. The plaintiff class is entitled to a remedy under 42 U.S.C. 1983.

Takings Analysis under the Ohio Constitution

Counts I and III of the amended complaint seek relief premised upon a violation of the "takings" clause in the Ohio Constitution. Section 19, Article 1 of the Ohio Constitution provides, "Private property shall ever be held inviolate, but subservient to the public welfare." In approaching one recent takings case under this Ohio provision, Chief Justice Moyer began "by reaffirming the premise that the law does not favor forfeiture." *State ex rei Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 131, 702 N.E.2d 81. R.C. 169.08(D) demands, in a very real sense, a forfeiture of interest earnings to the state.

As the *Pizza* decision recognized, the takings clause of the Ohio Constitution provides an independent basis for deciding such a case, although the legal analysis used tracks closely that given a takings claim under the United States Constitution. [FN5] See, also, *Norwood v. Homey,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 43. "Ohio has always considered the right of property to be a fundamental right. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." (Citations omitted.) Id. at ¶ 38. The Sixth Circuit recently observed that decisions granting relief from takings have become almost routine in the state courts of Ohio in the last decade. *Coles v. Granville* (C.A.6, 2006), 448 F.3d 853, 863-864. This too speaks to the viability of Article 1, Section 19 of the state Constitution.

The analysis of the factual record under the Fifth Amendment applies with full force under the Ohio Constitution. The plaintiff and the class he represents are entitled to restitution. E.g., *Santos v.Ohio Bur. of Workers'*

Comp., 101 Ohio St.3d 74, 2004-Ohio-28, 801 N.E.2d 441, syllabus.

Conclusion

Constitutions exist in America to arrest the devolution of power over certain key features of life. They assure that the will of majorities expressed in laws enacted by the legislative branches of the state and national governments always remain within predetermined boundaries. One important boundary surrounds private property. Ohio's legislature crossed that boundary in 1991 when it amended the first sentence of R.C. 169.08(D) and coupled retention of interest earnings with imposition of the five-percent administrative fee against all unclaimed funds returned to their rightful owners.

Pursuant to Civ.R. 57, the court grants a declaratory judgment consistent with this opinion. Furthermore the court holds that under Ohio law, the first sentence of R.C. 169.08(D) shall be deemed severed from the balance of the statute. See *Norwood,* supra, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 126-127.

To enforce the declaratory relief granted to the plaintiff class, the court grants the additional relief of an injunction barring the defendant and all those acting in concert with him from further enforcement of the first sentence of R.C. 169.08(D).

Recognizing that this opinion resolves substantial claims by the plaintiff class but may give rise to questions of fiscal management for the defendant's operations and other programs operated by state government using unclaimed funds, the court grants a stay of the effectiveness of this declaratory judgment and injunctive relief pending appeal, pursuant to Civ. R. 62(C) and (E). The stay is conditioned upon the defendant and all those under his control within the Division of Unclaimed Funds continuing to maintain careful records of all persons who are or become successful claimants during the pendency of appeals, and remaining in compliance with Class Action Management Order # 1 filed February 24, 2006, to assure that if the judgment is ultimately affirmed, all class members entitled to relief can readily be located and provided all relief to which they are entitled.

In the judgment being entered simultaneously with this opinion, the court certifies this case for immediate appeal, consistent with prior discussions with the parties, finding pursuant to Civ.R. 54(B) that there is no just reason for delay in entering the declaratory judgment and injunction because they determine the liability issues in this case. The court further finds that immediate interlocutory review of the judgment is in the interests of all parties and of the public. If these portions of the case are affirmed, the parties have stipulated that restitution or other equitable relief will be appropriate. Determining the amount of restitution due individual class members, a method of contacting them and distributing interest owed, consideration of an award of a reasonable attorney fee to the plaintiffs' counsel either on a common-fund basis or pursuant to the Civil Rights Attorney Fees Act, 42 U.S.C. 1988, are steps appropriately postponed until the core issues of legal liability discussed above are finally determined on appeal.

So ordered.

FN1. In state fiscal year 2005, the Ohio Division of Unclaimed Funds received $175 million in new unclaimed funds and refunded $54 million to 41,000 owners. The balance remaining to be returned to owners of the property was roughly $825 million. Although not yet formally part of the record because they became available only after all the briefings, on July 27, 2006, defendant announced publicly that $210 million was reported as new money to the Ohio Division of Unclaimed Funds during state fiscal year 2006. $64.4 million was paid out on over 43,000 claims. "Commerce News Release" found at *www.com. state, oh. us/press/display.asp? ID=866* (last visited 8/5/06).

FN2. The parties filed stipulations of fact on Sept. 30, 2005, and March 2, 2006. The stipulations squarely focus this case upon what the parties agree is a purely legal issue. The professionalism of counsel throughout this case, particularly in streamlining the factual record, reflects the best traditions of the bar.

FN3. Expenses claimed for 2004 and 2005 skyrocketed because of extraordinary costs attributed to outside auditors. They were paid on a contingent-fee basis to investigate potential holders of unclaimed funds outside Ohio, leading to recovery of additional unclaimed funds due the state. It distorts the concept of "operating expenses" for the division to lump these unusual contingency fees into the mix as ordinary expenses without offsetting them with the resultant "income" received. The amount of newly discovered unclaimed funds plus the interest earnings on them generated by outside auditors is no doubt far more than the contingency fees paid-the very definition of a contingency fee assures that! Without including extraordinary contingent fees in operating costs, the expense to operate the division appears relatively stable, adjusted for inflation, going all the way back to 1992. For this reason, the court attaches no significance to the nearly three-fold increase in "expenses" claimed for 2004 and 2005.

FN4. No one questions the "public use" element of this unclaimed funds case that clearly is equivalent to the public use of IOLTA fund interest recognized in *Brown*, 538 U.S. at 232, 123 S.Ct. 1406, 155 L.Ed.2d 376.

FN5. Equal protection and due process are other Ohio and federal constitutional provisions viewed as "nearly identical" in their application. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 424, 633

Uniform Unclaimed Property Act (1981)

GENERAL NOTES

<See, also, the Uniform Unclaimed Property Act (1995), ante, and the Uniform Disposition of Unclaimed Property Acts of 1966 and 1954>

TABLE OF JURISDICTIONS WHEREIN ACT HAS BEEN ADOPTED

Jurisdiction	Laws	Effective Date	Statutory Citation
Alaska	1986, c. 133	9-19-1986	AS 34.45.110 to 34.45.780.
Colorado	1987, c. 274	7-1-1987	West's C.R.S.A. § § 38-13-101 to 38-13-134.
District of Columbia	1981, D.C.Law 3-160		D.C. Official Code, 2001 Ed. § § 41-101 to 41-142.
Florida	1987, c. 87-105	7-1-1987	West's F.S.A. § § 717.001 to 717.1401.
Georgia	1990, p. 1506	7-1-1990	O.C.G.A. § § 44-12-190 to 44-12-236.
Hawaii	1983, c. 37	5-18-1983	HRS § § 523A-1 to 523A-41.
Idaho	1983, c. 209	7-1-1983	I.C. § § 14-501 to 14-543.
Iowa [FN1]	1967, C. 391	7-1-1967	I.C.A. § § 556.1 to 556.29.
Maryland [FN2]	1966, c. 611	6-1-1966	Code, Commercial Law, § § 17-101 to 17-326.
Michigan	1995, P.A. 29	1-1-1996	M.C.L.A. § § 567.221 to 567.265.
Minnesota [FN3]	1969, c. 725	7-1-1969	M.S.A. § § 345.31 to 345.60.

Jurisdiction	Laws	Effective Date	Statutory Citation
Nevada [FN4]	1979, c. 682	1-1-1980	N.R.S 120A.010 to 120A.450.
New Hampshire . .	1986, c. 204.1	1-1-1987	RSA 471-C:1 to 471-C:43.
New Jersey	1989, c. 58	4-14-1989	N.J.S.A. § § 46:30B-l to 46:30B-109.
North Dakota	1985, c. 510		NDCC 47-30.1-01 to 47-30.1-38.
Oklahoma	1991, c. 331	9-1-1991	60 Okl.St.Ann. § § 651 to 688.
Oregon [FN5]	1957, c. 670	8-20-1957	ORS 98.302 to 98.436.
Rhode Island . .	P.L.1986, c. 500	7-1-1987	Gen.Laws 1956, § § 33-21.1-1 to 33-21.1-41.
South Carolina ..	1988, Act No. 34A	7-1-1988	Code 1976, § § 27-18-10 to 658. Pt. II, § 27-18-400.
South Dakota	1992, c. 312	7-1-1993	SDCL 43-41B-1 to 43-41B-38.
Tennessee [FN6] .	1978, c. 561	3-6-1978	T.C.A. § § 66-29-101 to 66-29-138.
Utah [FN7]	1983, c. 164	7-1-1983	U.C.A.1953, 67-4a-101 to 67-4a-902.
Vermont [FN8]	1964, No. 35	1-1-1965	27 V.S.A. § § 1208 to 1239.
Virgin Islands ..	1988, Act 5341	6-6-1988	[FN*] 28 V.I.C. § § 651 to 687.
Virginia	1984. c. 121		Code 1950, § § 55-210.1 to 55-210.30.
Washington	1983, c. 179	6-30-1983	West's RCWA 63.29.010 to 63.29.905.
Wisconsin	1983, Act 408	12-31-1984	W.S.A. 177.01 to 177.41.
Wyoming	1993, c. 213	3-11-1993	[FN*] Wyo.Stat.Ann. § § 34-24-101 to 34-24-140.

FN[FN*] Date of approval.

FN[FN$1] The Iowa act, as amended by L.1984, H.F. 2522, retains the basic format and many of the provisions of the Uniform Disposition of Unclaimed Property Act of 1966, but now also contains many of the major provisions of the Uniform Unclaimed Property Act of 1981. Accordingly, the citation of the Iowa act is set forth in the tables for both acts.

FN[FN$2] The Maryland act, as amended by L.1985, c. 602, retains the basic format and many of the provisions of the Uniform Disposition of Unclaimed Property Act of 1954, but now also contains certain provisions of the Uniform Unclaimed Property Act of 1981. Accordingly, the citation of the Maryland act is set forth in the table for both acts.

FN[FN$3] The Minnesota act, as amended, retains the basic format and many of the provisions of the Uniform Disposition of Unclaimed Property Act of 1966, but now also contains many of the major provisions of the Uniform Unclaimed Property Act of 1981. Accordingly, the citation of the Minnesota act is set forth in the tables for both acts.

FN[FN$4] The Nevada act, as amended by L.1983, c. 520, retains the basic format and many of the provisions of the Uniform Disposition of Unclaimed Property Act of 1966, but now also contains many of the major provisions of the Uniform Unclaimed Property Act of 1981. Accordingly, the citation of the Nevada act is set forth in the tables for both of these acts.

FN[FN$5] The Oregon act, as amended by L.1983, c. 716, now contains the basic format and many of the provisions of the Uniform Disposition of Unclaimed Property Act of 1966, but now also contains many of the major provisions of the

Uniform Unclaimed Property Act of 1981. Accordingly, the citation of the Oregon act is set forth in the tables for both acts.

FN[FN$6] The Tennessee act, as amended by L.1984, c. 544, retains the basic format and many of the provisions of the Uniform Disposition of Unclaimed Property Act of 1966, but now also contains many of the provisions of the Uniform Unclaimed Property Act of 1981. Accordingly, the citation of the Tennessee act is set forth in tables for both acts.

FN[FN$7] Original 1983 adoption repealed in 1995. New provisions enacted in 1995 substantially retaining major provisions of Uniform Act. See the General Statutory Note, post.

FN[FN$8] The Vermont act, as amended by L.1985, No. 240, retains the basic format and many of the provisions of the Uniform Disposition of Unclaimed Property Act (1954), but now also contains certain provisions of the Uniform Unclaimed Property Act (1981). Accordingly, the citation of the Vermont act is set forth in the table for both acts.

HISTORICAL NOTES 2001 Main Volume

The 1981 Uniform Unclaimed Property Act was approved by the National Conference of Commissioners on Uniform State Laws in 1981. It supersedes the 1966 Uniform Disposition of Unclaimed Property Act.

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PREFATORY NOTE

2001 Main Volume

Why Change is Needed

Thirty-one states and the District of Columbia have enacted either the original 1954 version of the Uniform Disposition of Unclaimed Property Act, or the 1966 revision of that Act. Of the remaining 19 states, all but 2 have some form of escheat or abandoned property legislation. The 1954 Uniform Act was drafted as a response to conflicting legislation among the various states and in response to a series of Supreme Court decisions in the late 1940's and early 1950's. The 1954 and 1966 Acts served well as evidenced by their numerous adoptions. However, the era of stability was ended with the decision in Texas v. New Jersey. 379 U.S. 674 (1965). That decision established a set of priorities for claimant states which were, in some instances, inconsistent with those established by the Uniform Act. A few states which previously had enacted the Uniform Act have changed their legislation to reflect the holding in *Texas* v. *New Jersey*.

In the last decade states have become increasingly aware of the opportunities for collecting and returning to their residents unclaimed money and using the "windfall" unreturned funds as general fund receipts for the benefit of citizens of the state. Accordingly several states have sought to enforce their unclaimed property laws with enhanced vigor. They have found, however, that obtaining compliance with the law has been extremely difficult. In some instances the uncertain status of unclaimed property statutes in the wake of *Texas v. New Jersey* accounts for the high degree of noncompliance; many holders feel they do not know what is required of them. In addition the enforcement provisions of the Uniform Act are inadequate and have not served to encourage compliance with the Act.

The Uniform Act served its time. However, to conform the Uniform Act expressly to the Supreme Court ruling in *Texas v. New Jersey* a comprehensive revision is desirable.

The Impact of *Texas v. New Jersey*

The 1954 and 1966 Uniform Acts basically tied the enacting state's claim to abandoned property to the ability of that state's courts to assert personal jurisdiction over the holder. The basic jurisdictional test of Sections 2, 4, 5, 6, 7, 8 and 9 for a presumption of abandonment bears a direct relationship to events taking place within the state. The thrust of this "contacts" test generally is to allow any state with jurisdiction over the holder, i.e., the debtor, to take unclaimed property. In recognition of the potential for conflict among jurisdictions over the application of a contacts test, the Uniform Act contained a reciprocity clause in Section 10. Section 10 allowed another state to claim abandoned property if the last known address of the claimant was in that state and if other states with contacts would forego their claims. The success of this clause was dependent upon uniform enactment by competing states. However, this was never forthcoming, and the assertion of competing claims by states continued.

The Supreme Court decisions leading up to *Texas v. New Jersey* did little to clarify the law. The state of residence of the creditor could claim, Connecticut Mutual Life Insurance v. Moore. 333 U.S. 541 (1948). and the state of the holder's domicile could likewise escheat, Standard Oil Co. v. New Jersey, 347 U.S. 428 (1951).

Standard Oil also held that it was a denial of due process for more than one state to escheat the same property. This rule created a race of diligence among the states. In Western Union Telegraph Co. v. Pennsylvania. 368 U.S. 71 (1962), however, the court told the most diligent state (Pennsylvania) that it had to assure Western Union that no other state would claim the property. In *Western Union,* Pennsylvania sought to escheat uncashed money orders and drafts which were held by Western Union and unclaimed by either the senders or the payees. The court held that Western Union should not be embroiled in a race of diligence among New York, Pennsylvania and other states. The Supreme Court's opinion in effect admonished the states mutually to resolve which state was entitled to claim abandoned property or, absent agreement, to present their conflicting claims to the only judicial forum in which they could be resolved, the Supreme Court. Thus any state facing an actual or potential dispute by a sister state was forced to bring an original action in the Supreme Court for a declaration of its rights before it could take the property. This was the condition of the law when the Supreme Court decided *Texas* v. *New Jersey*. [FN1]

[FN1] While the court in Texas v. New Jersey set down rules applying to both escheat statutes and custodial type unclaimed property statutes (such as the Uniform Act), all but a few of the states have laws which are custodial and allow the lawful owner to claim the property at any time.

The problem in *Texas* v. *New Jersey* was which of several states was entitled to escheat intangible property consisting of debts owed by Sun Oil Company and left unclaimed by creditors. Four rules were proposed:

1. that the funds should go to the state having the most significant "contacts" with the debt;

2. that the funds should go to the state of the debtor company's incorporation;

3. that the funds should be paid to the state in which the

company has its principal place of business; and

4. that the funds should be paid to the state of the creditor's last known address as shown by the debtor's books and records.

Rule 4 was adopted by the Supreme Court as a "simple and easy" standard to follow. The court pointed out that this rule tended to "distribute escheats among the states in proportion of the commercial activities of their residents". In addition to the holding that the state of the creditor's last known address is entitled to escheat or custodially claim the property owed to the creditor, the court held that, if the creditor's address does not appear on the debtor's books or is in a state that does not provide for the escheat of intangibles, then the state of the debtor's incorporation may take custody of the property until some other state comes forward with proof that it has a superior right to escheat or take custody.

The *Texas v. New Jersey* rule makes the Uniform Act inadequate because the Uniform Act is based on the claimant state's ability to assert jurisdiction over the holder. Under *Texas v. New Jersey* a Uniform Act state may not claim certain property held by persons subject to its jurisdiction (which the Uniform Act covers) but can assert custody to property held by persons not subject to its jurisdiction (which the Uniform Act does not cover).

A simple hypothetical illustrates the problem of meshing the rule of *Texas* v. *New Jersey* with the Uniform Act. Assume a corporate holder, incorporated in State A, holding unclaimed property (an uncashed dividend check) belonging to a claimant whose last known address was in State B. The holder does not do business in State B. Under the *Texas v.*

New Jersey rule, State B is the first priority claimant. However, since the holder does not do business there the Uniform Act would not authorize State B to assert a claim to the property. State A, if it had enacted the Uniform Act, could claim the property under its abandoned property law in accordance with the second priority rule of *Texas v. New Jersey;* however, that frustrates the goal of equitable distribution of unclaimed property among creditor states.

Why Uniformity is Necessary

The 1954 and 1966 Uniform Acts responded to the need for symmetry in the law for the benefit of persons doing business in more than one state. Widespread enactment of the Uniform Act by the States indicates their recognition of the need for uniformity.

Since the 1954 and 1966 Acts are inconsistent with *Texas v. New Jersey* and other cases, the Conference, after receiving the report of a Study Committee, decided to revise the Uniform Act once again.

What the Act Does to Conform With *Texas v. New Jersey*

Section 3 of the Act provides a statutory response which is consistent with the Court's pronouncement in *Texas v. New Jersey.* Basically, the Act provides that unclaimed intangible property is payable to the state of last known address of the owner. In those instances in which that information is unknown or the state of the owner's last known address does not assert a claim to the property, it is payable to the state of the holder's domicile.

There are other sections which shore up this scheme of priority, some of which are necessitated by the *Texas* v. *New Jersey* decision and some of which merely represent a statutory enactment of existing practices among states. One issue which has been raised by academic commentators concerns the reporting requirements of abandoned property legislation in light of the priority rules among claimant states enunciated by *Texas v. New Jersey*. Because the *Texas v. New Jersey* decision authorizes a state to claim abandoned property even though it cannot assert personal jurisdiction over the holder, the question has arisen as to whether a claimant state in that instance has the power to compel reporting from a holder to ascertain the existence of its claim. That is an important consideration, for the right given to the state of last known address by *Texas* v. *New Jersey* is a hollow one if the state is without sufficient information to assert its claim to abandoned property. [FN2]

> [FN2] Texas v. New Jersey did not decide whether the state which is entitled to the first priority claim can compel reporting by a foreign corporation. The issue was neither briefed nor argued in the case; however footnote 8 of the decision implies that such a legislative power exists. The right given to creditor states would be meaningless without the remedy of compelling reports.

The state acts as a conservator of the lost owner's property and the Act is akin to a succession statute. [FN3] The *Texas* v. *New Jersey* rule, as the Supreme Court noted, is a variation of the common law concept of *mobilia sequunter personam,* according to which the law of the state of domicile of the intestate owner determines the right of succession to personal property. The state in which the owner last resided is a rough indicator of domicile, and that state is entitled to provide by legislation for succession. The state of last known address, succeeding to the right of the owner, is entitled to compel a holder to disclose the existence of property which belongs to the owner in the same manner that a conservator of an estate of an incompetent or the administrator of the estate of a missing person or decedent can compel the holder of that person's property to account for it. [FN4] That the state may not be able to assert its claim in its own courts, but would be required to use the courts of another jurisdiction, is not determinative of its power to act as a custodian. [FN5] Hence the suggestion that corporate holders not "doing business" in a state might escape their obligation to pay unclaimed properly owing to persons with last known addresses in that state is incorrect. [FN6]

[FN3] The Court's decision in Connecticut Mutual Life Insurance Co. v. Moore. 333 U.S. 541. 546-47 (1947). described the state as a "conservator" when claiming property under a custodial unclaimed property law. The Court in Standard Oil Co. v. New Jersey, 347 U.S. 428, 437 (1951), characterized the Moore case as involving a "conservation statute".

[FN4] As the United States Supreme Court noted in upholding the constitutionality of the Massachusetts custodial unclaimed property laws: "[i]f the facts warrant it, a legal representative can be appointed at any time with all the rights incident to such appointment, including that of withdrawing the funds and holding them for the true owner when he shall establish his claim." Provident Institution for Savings v. Malone. 221 U.S. 660. 666 (1911).

[FN5] In this connection, see Commonwealth of Pennsylvania v. Kervick. 60 N.J. 289. 288 A.2d 289 (1972) (Pennsylvania held entitled to sue in New Jersey state courts for property owing to Pennsylvania residents.)

> [FN6] "Doing business", for purposes of service of process is limited only by the Fourteenth Amendment of the United States Constitution. On the other hand, jurisdiction to regulate a foreign corporation in a substantive fashion must run the gauntlet of the Commerce Clause, the Equal Protection Clause, and the Impairment of Contracts Clause as well as the Due Process Clause. (See Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) (a Delaware business is not required to collect a sales tax from Maryland purchasers even though it makes some deliveries in Maryland)).

The Supreme Court's failure to expressly mandate a reporting requirement in *Texas* v. *New Jersey* does not appear significant. Holders rarely raise a defense of failure to "do business" in response to a request for reporting. In any event many major holders are subject to the regulatory jurisdiction of most states. Even in those instances in which a holder is not subject to the regulatory jurisdiction of a state, the claimant state can nevertheless require reporting under this succession analysis.

Other Changes in the Act

In recent years the National Association of Unclaimed Property Administrators has become an active group. There is growing cooperation among member states to exchange information. Several states have joined together to conduct joint investigations of holders. States also have agreed that they will collect property for each other from holders, and they regularly exchange property. This Act seeks to encourage further cooperation among the states by authorizing such joint agreements and by authorizing the adoption of uniform reporting forms. See Section 33. Neither the existing agreements among states nor the agreements envisioned under Section 33 require the consent of Congress under the Compact Clause of the Constitution, Art. I, § 10, cl. 3. The Supreme Court has held that the Compact Clause is limited to combinations or agreements that tend to increase the political power of the states to such an extent that it interferes with the supremacy of the United States. United States Steel v. Multi-State Comm., 434 U.S. 452 (1978).

The 1966 Act provided a presumption of abandonment of unclaimed dividend or interest checks but arguably did not cover the underlying ownership interest represented by issued and outstanding securities certificates. In recent years several states have amended their statutes to authorize taking of this property and indications are that the trend is likely to continue. California, Florida, Indiana, Maine, Massachusetts, Montana, Rhode Island and Virginia have statutes with such provisions and other states are known to be considering similar proposals. The new Act specifically covers securities even though they are not in the possession of the issuer. See Section 10.

Two major concerns have been expressed with the concept of presuming abandonment of underlying shares of stock or principal amounts of debt securities where the dividends or interest payments have been unclaimed. First, under what circumstances is it proper to presume abandonment and, second, what are the rights of the various parties when the conditions precedent to abandonment have occurred'? As to the first question, Section 10 of the Act requires that there must be the passage of at least 7 years after the failure of an entitled person to claim or inquire about a dividend, interest payment, or other distribution and also the payment of at least 7 dividends, interest sums, or other distributions during such period which remain unclaimed.

As to the rights of the parties under the Act. the Administrator is entitled to have duplicate certificates issued in the state's name. The issuer of the duplicate certificate is relieved of all liability respecting the property delivered (Section 19) and is protected against claims by virtue of the administrator's duty to defend on behalf of the issuer and to indemnify that party against any liability on **account** of such claims (Section 20).

Under the Act, the administrator may require any person who has not filed a report to file a verified statement that he has or has not any unclaimed and reportable property (Section 30). The administrator has a right to audit records not limited to cases where there is reason to believe a person is not complying with the Act (Section 30).

In keeping with the Act's focus on the last known address of an owner as vesting a state with a priority claim to property, the revision requires a holder who has a record of the last known address to retain it for 10 years after the property becomes reportable (Section 31).

The Act reflects a tendency among state legislatures in recent years to reduce dormancy periods. The current high inflation rate exacts a severe penalty from one who holds money or its equivalent for extended periods; an inference of loss or abandonment may be drawn more quickly than in 1966 when the value of money was more stable. The general rule of presumed abandonment is 5 years (Section 2) as compared with 7 years in the 1966 Act. A one year dormancy period is provided for unclaimed wages (Section 15), utility deposits (Section 8), refunds due from utilities (Section 9), and property held by courts and government agencies (Section 13).

Another set of problems addressed in the revision has to do with service charges imposed on abandoned property. Experience has shown that service charges levied against outstanding items such as money orders and cashier's checks as well as inactive and dormant checking and savings accounts have completely wiped out otherwise reportable property. Sections 5(b) and 6(c) of this revision codify the case law which has limited these charges.

The 1966 Act did not address the small but active heir finder's industry; that is, those businesses which pursuant to contract attempt to locate owners of abandoned property. Some state statutes have placed limits on the role of heir finders from the time property becomes reportable until a specified time after it has been turned over to the state. Section 35 of the new Act prohibits heir finder activity during a two-year period after payment or delivery to the state.

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Showing Sections of the Uniform Unclaimed Property Act (1981) and the 1966 Uniform Disposition of Unclaimed Properly Act.

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Section 3 [General Rules for Taking Custody of Intangible Unclaimed Property.]	No comparable section
Section 4 [Travelers Checks and Money Orders.]	Section 2
Section 5 [Checks, Drafts and Similar Instruments Issued or Certified by Banking and Financial Organizations.]	Section 2
Section 6 [Bank Deposits and Funds in Financial Organizations.]	Section 2
Section 7 [Funds Owing Under Life Insurance Policies.]	Section 3
Section 8 [Deposits Held by Utilities.]	Section 4
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Section 21 [Crediting of Dividends, Interest or Increments to Owner's Account.]	No comparable section
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Section 25 [Claim of Another State to Recover Property; Procedure.]	No comparable section
Section 26 [Action to Establish Claim.]	Section 21

Section 27 [Election to Take Payment or Delivery.]	Section 22
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UNIFORM UNCLAIMED PROPERTY ACT (1995)

TABLE OF JURISDICTIONS WHEREIN ACT HAS BEEN ADOPTED

Jurisdiction	**Laws**	**Effective Date**	**Statutory Citation**
Alabama	2004, c. 440	5-12-2004	Code 1975, § § 35-12-70 to 35-12-96.
Arizona	2000, c. 184	1-1-2001	A.R.S. § § 44-301 to 44-339.
Arkansas	1999, Act 850	3-24-1999 [FN*]	A.C.A. § § 18-28-201 to 18-28-230.
Indiana	2002, P.L. 2-2002	7-1-2002	West's A.I.C. 32-34-1-1 to 32-34-1-52.
Kansas	1999, c. 100	1-1-2000	K.S.A. 58-3934 to 58-3980.
Louisiana	1997, Act 809	7-10-1997	LSA—R.S. 9:151 to 9:181.
Maine	1997, 1st. Sp.Sess., c. 508	7-1-1998	33 M.R.S.A. § § 1951 to 1980.
Montana	1997, c. 124	7-1-1997	MCA 70-9-801 to 70-9-829.
New Mexico	1997, c. 25	7-1-1997	NMSA 1978, § § 7-8A-1 to 7-8A-31.
North Carolina	1999, S.L.1999-460	1-1-2000	G.S. § § 116B-51 to 116B-80.
West Virginia	1997, c. 1	7-1-1997	Code, 36-8-1 to 36-8-32.

FN[FN*] Date of approval.

HISTORICAL NOTES 2001 Main Volume

The Uniform Unclaimed Properly Act (1995) was approved by the National Conference of Commissioners on Uniform State Laws in 1995. It supersedes the Uniform Unclaimed Property Act approved in 1981. The 1981 act had superseded the Uniform Disposition of Unclaimed Property Act approved in 1966. The 1966 act had superseded the Uniform Disposition of Unclaimed Property Act approved in 1954.

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Statement of the History of the Act

This Act is preceded by the 1954 Uniform Disposition of Unclaimed Properly Act (1954), which was revised in 1966, and the Uniform Unclaimed Property Act (1981). The 1954 Act was drafted during a period of conflicting legislation among the various States and several Supreme Court decisions in the late 1940's and early 1950's. In 1965. these conflicts were resolved by the decision in *Texas v. New Jersey*. 379 U.S. 674 (1965), which established a set of priorities for claimant States. These rules of priority were then adopted in the 1981 Act. They were re-examined and reaffirmed in *Delaware v. New York*. 507 U.S. 490. 113S.CT. 1550. 123 L.Ed.2d 211 (1993). Although the *Delaware* Court made no change in The rules of priority, it clarified the issue of how to determine the identity of the "debtor"—the "holder" under this Act—when payments by intermediaries are at stake. The "debtor" will be defined by reference to the state law that creates the property interest; an intermediary which holds property in its own name will generally be the debtor, and not the original obligor which has satisfied its obligation by transmitting payment to the intermediary. *Delaware v. New York* also makes it clear that no State may supersede the Court's priority rules by seeking to establish different priorities under state law. See Comments to Section I and Section 4 for further discussion of these rules.

This Act retains the custodial features of the 1954 Act and the 1981 Act. Thus, the State does not take title to unclaimed property, but takes custody only, and holds the property in perpetuity for the owner.

A State may enforce its claim of custody in the courts of other jurisdictions, see *Commonwealth of Pennsylvania v. Kervick*, 60 N.J. 289, 288 A.2d 289 (1972), or in its own courts. Even if a holder does not do business in the State, that State should be able to require the holder to report and deliver unclaimed property in the State, under the *Texas* v. *New Jersey* rationale, based on the common law rule of *mobilia sequimtur personam:* the right of succession to personal property is governed by the law of the owner's domicile. See also *Connecticut Mutual Life Insurance Co.* v. *Moore*. 333 U.S. 541, 546-47 (1947), where the Supreme Court described the State as a "conservator" when claiming property under a custodial unclaimed property law. The Court in *Standard Oil Co.* v. *New Jersey,* 347 U.S. 428, 437 (1951), characterized the Moore case as involving a "conservation statute." See generally Epstein, McThenia and Forslund, "Unclaimed Property Law and Reporting Forms," sections 2.01,3.02,4,01 (Matt. Bend. 1984).

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INADVERTENCE AND THE INTERNAL REVENUE CODE: FEDERAL TAX CONSEQUENCES OF STATE UNCLAIMED PROPERTY LAWS

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Each year Americans lose track of personal property worth, in the aggregate, hundreds of millions of dollars. According to one estimate, 25% ***124** of us are owed money or other assets about which we do not know. [FN1] We fail to cash checks for stock dividends or salary payments. We neglect to claim security deposits, utility deposits, and insurance benefits. Checking and savings accounts remain untouched, gift certificates unused. We die without informing our heirs about all our assets. Author David Folsom believes that unclaimed property in this country may amount to some $1 trillion. [FN2]

Laws in all fifty states require businesses that hold certain kinds of unclaimed property [FN3] to transfer such property to the state after periods of inactivity that vary from less than one to seven years. [FN4] As a result of these laws, states hold billions of dollars of unclaimed property. [FN5] New York, for example, held $416 billion as of 1998 and California currently has $2.6 billion in unclaimed property funds. [FN6]

*125 State governments do not themselves take title to this unclaimed property, but hold the property in perpetuity as custodian for the owner. [FN7] After the state has acquired the property, state administrators, some more vigorously than others, seek to identify the owner and return the property. If the owner is found, the owner receives back the property and, in some states and for some kinds of property, interest on the property at a statutory rate, a rate generally less than the amount the state earns on these funds. [FN8] If the owner is not found (and the vast majority are not), the state has the use of these funds in perpetuity. [FN9]

Most states acquire such lost property pursuant to statutes modeled, in whole or in part, on the Uniform Unclaimed Property Act ("UUPA"). [FN10] The National

Conference of Commissioners on Uniform State Laws, the sponsor of the UUPA, has described the purposes of the model act: "[T]o protect the interests of owners, to relieve the holders from annoyance, expense, and liability, to preclude multiple liability, and to give the adopting state the use of some considerable sums of money that otherwise would, in effect, become a windfall to the holders thereof." [FN11] Thus, one express function of the UUPA is to supply states with a source of non-tax revenues. The American Tax Policy Institute, recognizing the growing importance of such laws, has recently commissioned a study of state audits of unclaimed property. [FN12] State Tax Reporters published by Commerce Clearing House now include detailed coverage of state unclaimed property laws. [FN13]

The amount of unclaimed property subject to these laws is expected to increase markedly in upcoming decades. An industry publication recently observed, "Given the shrinking resources available to state governments and ***126** a widespread anti-tax climate, it is likely that non-tax revenue-generating programs such as abandoned property will not only be fully embraced by the states but expanded and strengthened." [FN14] The director of Louisiana's unclaimed property program has commented, "Unclaimed property of the future will include IRAs . . . Can you imagine the number of people who will start accounts with $2,000 now and forget about them 50 years later?" [FN15]

Like the number of people with claims, the dollar amount of funds reclaimed by owners is also expected to grow. The media have been drawing attention to the existence of these state funds and the ability of owners and their heirs to reclaim such property. Authors of books, private finding companies, and state administrators have been interviewed for The New York Times, Money Magazine, the Oprah Winfrey show, CNN Today and NBC's Today show. [FN16] States reported an increase in claims after the Oprah

Winfrey show. [FN17] Many states now post on the Internet lists of those with unclaimed property. [FN18]

The loss and recovery of property raise a myriad of federal tax issues, issues involving taxation of the holder, the owner, and of the state itself. While most individual claims are small, [FN19] they have important tax consequences in the aggregate. Moreover, some claims involve hundreds of thousands of dollars and thus could have an enormous impact on the particular claimant's tax liability. [FN20] At a theoretical level, the issues are among the thorniest involving the definition of ownership and income. Many of the ***127** issues raised by the UUPA are precisely those that plague students beginning their study of the federal income tax—windfalls, the tax benefit rule, the treatment of deposits, constructive receipt. Estate tax issues, such as the definition of the gross estate, arise as well. Up to now, the academic literature involving unclaimed property statutes paid scant attention to the tax issues. [FN21] The few judicial and administrative tax authorities discussing these issues have considered the effect of these laws only on private companies holding unclaimed property.

This article addresses both the theoretical and practical tax considerations involved in UUPA and similar statutes. It discusses how the practical effects of these laws force us to reconsider some of the theoretical underpinnings of a variety of tax doctrines. In particular, it exposes how our substantive tax laws assume that taxpayers act intentionally, as rational actors knowledgeable about and aware of their actions. For the most part, our substantive tax laws, unlike the procedural rules with their specific penalties for negligence, [FN22] are ill-equipped to deal with accident, inadvertence, or carelessness on the part of the taxpayer.

Issues involving accident and carelessness also arise in connection with personal deductions permitted for casualty loss and medical expenses. A sizeable body of scholarship has focused on whether such expenditures should be taxed, in particular whether they constitute consumption under the Haig-Simons definition of income. [FN23] Like earlier considerations of the casualty loss ***128** and medical expense deduction, examining the tax issues implicated by unclaimed property laws forces us to refine and rethink a range of basic tax concepts, including the very nature of the tax base. The case of unclaimed property also reminds us that our tax laws apply to human behavior and that our tax base needs to allow for human frailty. It enables us to identify those tax doctrines that accommodate carelessness and those that do not. Indeed, it asks us to develop, categorize, and, at least in part, judge tax doctrines on the basis of their ability to make this accommodation.

Part I considers the work of other scholars on the tax treatment of carelessness. Part II describes the operation of statutes such as the UUPA. Part III, IV, V and VI consider, respectively, the consequences of the UUPA when the owner fails to claim the property, while the holder keeps the unclaimed property, after state acquisition and use of the unclaimed property, and upon recovery by the original owner or the owner's heirs or devisees. The article concludes by suggesting that various tax doctrines, including the notion of debt, be limited to knowing actions by the taxpayer.

I. CARELESSNESS IN TAX THEORY

Notions of accident or carelessness, either by the taxpayer or by those, such as transfer agents, brokers, and banks with whom the taxpayer deals, do not fit neatly into traditional tax policy concerns, whether they involve the definition of income, concern with efficiency and incentives, or the proper role of a wealth transfer tax. [FN24]

Tax scholars have most often broached the tax treatment of carelessness when evaluating the personal deduction for medical expenses under § 213 or casualty losses under § 165(c) against the Haig-Simons definition of income. This influential and classic attempt to achieve an ideal or comprehensive tax base defines income as consumption plus net accretions to wealth. [FN25] This formulation, however, does not tell us whether to consider abandonment of property or loss through carelessness as a form of consumption or change in market value.

***129** Focusing on the meaning of consumption under the Haig-Simons definition, William Andrews argued that we should look to the actual enjoyment of goods and services: "[I]f his [a taxpayer's] consumption . . . of real goods and services (or claims thereto) is less than his money income, for whatever reason, in any substantial and ascertainable way, then under Simons' definition that discrepancy should be adjusted for by a deduction from money income." [FN26] Applying this understanding, Andrews reasoned that neither medical expenses nor charitable contributions should be included in the income tax base. In his view, neither use should constitute consumption because neither is a private preclusive appropriation that improves a taxpayer's position beyond a base line of tax-free good health. [FN27]

Under the Andrews view of the Haig-Simons definition, then, unclaimed property that has been presumed abandoned should be deducted as a loss, no matter whether the taxpayer or someone else was the careless one. The taxpayer has not enjoyed private, preclusive use. If such property is properly deductible, then its recovery would represent income. Of course, those who have lost track of their property will not be in a position to claim the loss, unless they can do so on an amended return before the statute of limitations runs. Only those who recover property would be aware of its earlier loss, and thus the practical impact of

Andrew's theoretical view is to increase taxation of those who recover unclaimed property. Recovery would permit private preclusive use for the taxpayer's consumption.

Professor Kelman took sharp issue with Professor Andrews' approach. In Professor Kelman's view, income, the amount available for consumption, not consumption itself, is what should matter for an income tax. [FN28] He states, "While the tax system should not force a taxpayer to take dominion over as many resources as she is able, once she voluntarily takes control of resources, her particular subsequent uses of those resources are irrelevant to tax law." [FN29] Under this criterion, Kelman, nonetheless, felt no discomfort with a casualty deduction for a stolen paycheck because "the taxpayer has never effectively received or appropriated income; that earnings capacity over a lifetime includes the risk of being unable to appropriate one's earnings and that it is ***130** administratively feasible to measure differential risks among taxpayers only when losses actually occur." [FN30]

For Kelman, as for others, voluntariness is a key touchstone. At the time he was writing, section 104 protected a taxpayer from taxation of proceeds of a tort judgment for invasion of privacy. Kelman approved the result: "Ultimately, it is the involuntariness of the conversion that bars taxability." [FN31] Because Professor Kelman believes that "the trigger to taxability ought to be a person's voluntary entrance into the market," [FN32] and because he would wish to avoid forced marketing, he would not tax imputed income from leisure or services provided within the household.

Similarly, Professor Koppelman would allow deductions for involuntary expenditures because "the involuntary nature of an item may suggest that the taxpayer does not receive personal value equal to the amount of the expenditure." [FN33] Professor Halperin, too, would generally measure consumption on an ex ante basis by the amount expended precisely because he believes that "most significant losses are a result of voluntary behavior or could be avoided through insurance." [FN34] Like Kelman, Halperin is ambivalent about how to treat a stolen paycheck or misplaced cash. On one hand, as he explains, a taxpayer whose paycheck is stolen gets no benefit from the transaction and perhaps should be entitled to a deduction. On the other, "it could be that the loss of a paycheck or theft of cash is a result of a life-style choice . . .. For example, the taxpayer may lose his paycheck when he stops in a bar on the way home from work." [FN35]

All these commentators are willing to consider excluding involuntary expenditures from the tax base. [FN36] All except Andrews would include in the ***131** income tax base voluntary personal expenditures, at least those that result from conscious choice, as a taxable element of consumption. Yet carelessness, negligence and inadvertence are difficult to categorize as either voluntary or involuntary. Professor Newman, writing about the casualty loss deduction has observed:

> If casualty losses caused by voluntary acts are nondeductible, is a negligent act a voluntary act? Unfortunately, on a continuum from voluntary to involuntary, negligence falls in between "had to" and "did not have to," closer to the fuzzier "could have prevented." The location of negligence on the voluntary/involuntary continuum is not helpful. [FN37]

Even if we reject voluntariness as a criterion, categorizing carelessness under the traditional Haig-Simons definition is difficult. We could say that to tax carelessness is to tax leisure; the property most often goes unclaimed because the owner failed to exercise care. Equally plausibly, we could say that unclaimed property must be considered in the tax base under either arm of Haig-Simons: either failure to keep track of the property is a form of consumption or unclaimed property involves the consequences of market transactions, whether earning a salary check or buying dividend-paying stock or filing an insurance claim, and thus loss of control of the property does represent a net decrease in wealth.

The Haig-Simons approach purports to offer an economic definition of income. By positing a comprehensive tax base, this definition in particular emphasizes questions of horizontal equity, of taxing in the same way those who are similarly situated. [FN38] Questions of economic efficiency have always attracted tax theorists as well. At its simplest, economic efficiency seeks the aggregate maximization of wealth and income in society and as a criterion for tax law asks that taxes be designed to minimize the misallocation of resources. ***132** "This means, for one thing, that we should try to be sure that we have not produced unintended perverse incentives." [FN39]

In tort law, for example, efficiency analysis assumes that increasing the costs of carelessness or negligence will give individuals an incentive to be careful. Taxing unclaimed property, however, seems unlikely to have such incentive effects, at least for careless owners. [FN40] Loss of the property is itself a detriment that should encourage diligence. Additional tax consequences are unlikely to encourage a greater level of care.

Tax efficiency, however, is concerned with the difference between consumers' actual after-tax behavior and the behavior they would engage in merely because they have less revenue. [FN41] Of late, several tax scholars have argued that efficiency analysis in the form of optimal taxation offers a more sophisticated approach than Haig-Simons. [FN42] "This theory begins by observing that tax preferences and penalties disturb the free market . . . only to the extent that behavior is, in fact, subject to modification" and that thus, taxes should be heavier on items that are "inelastic," that is, have a low "response rate" to tax. [FN43]

Under such a view, unclaimed property is ripe for income taxation. Since loss of property is its own punishment, taxation in addition will not modify economic behavior. Although not articulated in this way, the inelasticity of careless loss may in fact be one of the motivations for states' adopting unclaimed property laws. The state taking possession of unclaimed property represents a relatively painless method of raising revenue.

Unclaimed property, moreover, involves estate taxation as well as income taxation, and economic efficiency is a classic justification for the estate tax. "Since death is an uncertain future event and since it removes from the scene of action the person chiefly interested, death taxation probably has less effect on the individual's activities than do other more immediately pressing taxes." [FN44] Indeed, one scholar has characterized bequests as "largely 'accidental'" and explained that, as a result, "an estate tax has no behavioral impacts. It represents a nondistortionary source of revenue that permits the ***133** government to lower the use of other, distorting taxes." [FN45] That is, under such an efficiency approach, accident calls for taxation.

With the estate tax as with the income tax, other considerations, in particular the proper base for the tax, may call for a different answer. In the case of the estate tax, many scholars have deemed an accessions tax, a tax on the recipient's cumulative lifetime gifts and inheritances, preferable to an estate tax, which is a tax on the transfer of property by gift or on death. Scholars promoting an accessions tax argue both that it "would be more consistent with the purpose of federal transfer taxes to promote dispersion of wealth" and "that rate graduation in accordance with the circumstances of the recipient is fairer, or at least more rational, than graduation according to the wealth of transferors, simply because the recipient probably bears the burden of the tax in any event." [FN46] As discussed in more detail below, since the executors, heirs or devisees are often the ones who learn about the unclaimed property and seek its return, unclaimed property poses a particularly stark choice between an estate tax and an accessions tax.

Loss and recovery of unclaimed property raises all of these theoretical issues. Moreover, it raises an even broader question, the extent to which our tax models accept the economic model that taxpayers act as rational, utility maximizers. The model of economic efficiency, after all, assumes that two willing parties are entering into voluntary transactions. In contrast, the case of unclaimed property demonstrates how frequently people err. It suggests that both in general and in the development of discrete tax doctrines, we need to supplement our economic models with psychological ones, whether in grand tax theories or individual tax doctrines.

II. OPERATION OF UNCLAIMED PROPERTY LAWS

In the vast majority of states, unclaimed property laws now establish a detailed and elaborate statutory scheme for dealing with property involuntarily lost through neglect, carelessness, or inadvertence. Common law directed that property without a known owner would escheat to the sovereign, [FN47] whether the sovereign was feudal lord or the state. As society became more complicated and the types of intangible personal property increased, statutes began to replace common law. For example, California in 1915 adopted a statute for ***134** the escheat of bank deposits. [FN48] It required a judicial proceeding for the particular deposits to be declared abandoned and thus eligible for escheat to the state. [FN49]

In 1954, the *National Conference on Commissioners on* Uniform State Laws and the American Bar Association approved for the first time a Uniform Disposition of Unclaimed Property Act. [FN50] This Act was revised in 1966, [FN51] and in 1981 the Commissioners proposed the Uniform Unclaimed Property Act. [FN52] As of July 1995, the vast majority of the states had adopted most of the provisions of 1981's Uniform Unclaimed Property Act. [FN53] In 1995, the Commissioners approved yet another revision of these model laws, the Uniform Unclaimed Property Act (UUPA). [FN54] These model laws cover such intangible personal property as dormant checking and savings accounts, uncashed payroll or cashiers checks, money orders and travelers checks, certificates of deposit, customer deposits or overpayments, paid-up life insurance policies, health and accident insurance payments, uncashed death benefit checks, gift certificates, stock and dividends, utility deposits and mineral royalty payments. [FN55]

The UUPA applies when property is "presumed abandoned." [FN56] Property is presumed abandoned when the apparent owner has not indicated some interest in the property, such as claiming a dividend or making a deposit to a bank account. [FN57] The UUPA defines an apparent owner as "a person whose name appears on the records of a holder as the person entitled to property held, issued, or owing by the holder." [FN58] The holder, who is "a person obligated to hold for the account of, or deliver, or pay to, the owner property that is subject to this [Act]," [FN59] then must file a report regarding the property with the appropriate state administrator. [FN60]

Section 2 of the UUPA lists the presumptions of abandonment. For example, wages and other compensation for personal services are presumed ***135** abandoned one year after the compensation becomes payable. [FN61] Stock or other equity interest in a business or financial association is presumed abandoned five years after the date of the most recent dividend or "the date of the second mailing of a statement of account or other notification or communication that was returned as undeliverable or after the holder discontinued mailings, notifications, or communications to the apparent owner." [FN62]

The 1995 amendments reduced the period of time after which abandonment will be presumed in several instances. [FN63] Under the UUPA, the presumption of abandonment period for corporate stock is now five years instead of the seven years specified in the 1981 version of the uniform act, while that for gift certificates is now three years instead of five years. [FN64] Some states have gone further. For most properties, California, Massachusetts and New York have a three-year period for presumption of abandonment. [FN65]

A corporation or a business entity that holds property presumed abandoned is required to make a report to the state administrator and to pay or deliver the property to the administrator. [FN66] In general, the report must contain the nature of the property, the name, if known, and last known address, if any, and the social security number or taxpayer identification number, if readily ascertainable, of the apparent owner of property with a value of $50 or more, except with respect to traveler's checks or money orders. [FN67] The Comment to the UUPA notes that before filing this report, the holder "must send written notice to the apparent owner, if the owner's claim is not barred by the statute of limitations, the property has a value of $50 or more, and the holder's records do not disclose the address to be inaccurate." [FN68] Besides this requirement, the holder does not have to take on any other efforts to notify the apparent owner. Furthermore, a holder who "pays or delivers property to the administrator in good faith is relieved of all liability arising thereafter with respect to the property." [FN69] The state and its administrator will then assume custody and responsibility over the property. [FN70]

***136** Next, the state administrator publishes a notice in a newspaper of general circulation in the county of the state in which is located the last known address of any person named in the notice. [FN71] The advertisement must contain the name of each apparent owner, their last known address, an explanation that the property of the owner is presumed to be abandoned and has been taken into protective custody by the state, and a statement that the information on the property and its return to the owner is available. [FN72] In many jurisdictions, the state administrator must also send a notice to the apparent owner's last known address. [FN73]

For non-cash property, other than securities, the state administrator sells the property to the highest bidder at a public sale or auction. [FN74] Securities must be sold at the prevailing price on the exchange. [FN75] Under the UUPA, the state will sell such non-cash property within three years of its receipt. [FN76] Some states sell the property sooner. In California, the state controller sells securities listed on an established stock exchange within one year following receipt. [FN77] Nevada also sells within one year. [FN78] New York waits fifteen months before selling. [FN79]

Generally, the administrator deposits in the general fund or some other state fund all proceeds received under the UUPA, including proceeds from the public sale of the abandoned property. [FN80] Thus, the state benefits from the monies themselves or from earnings on these monies. Before making this deposit, the state administrator of the abandoned property may retain some money in a trust account for payment and administration of claims. [FN81] The Comment to the UUPA recommends the state to retain at least $100,000. [FN82]

***137** Owners of the property may file claims for the funds at any time. [FN83] There is no time restriction. Moreover, an owner is defined to include "a person who has a legal or equitable interest in the property subject to this [Act] or the person's legal representative." [FN84] Thus, owner includes heirs and devisees of the person who owned the property at the time of the presumed abandonment. In addition, since owners can file claims many years after presumed abandonment, the UUPA is not a true escheat statute, although people often refer to the UUPA and similar state statutes as escheat statutes.

Under the UUPA, the owner is entitled to "any income or gain realized or accruing on the property at or before liquidation or conversion of the property into money." [FN85] In addition, the owner of an interest-bearing demand, savings or time deposit will generally receive interest at a specified statutory rate or at any lesser rate the property earned while in possession of the holder. [FN86] Section 11 of the UUPA states, "Interest begins to accrue when the property is delivered to the administrator and ceases on the earlier of the expiration of 10 years after delivery or the date on which payment is made to the owner." [FN87] For property that is not interest-bearing, such as an unclaimed salary check, the UUPA imposes no obligation upon the state to pay interest, even though the state itself can either use or earn money on the funds. [FN88] Some states, such as Nebraska, are less generous than the UUPA and pay no interest on claims. [FN89] Other states are more generous than the UUPA. [FN90]

In sum, assets that are subject to unclaimed property statutes go through a series of steps. First, property will be subject to these laws only if the owner fails to indicate some interest in the property, such as claiming a dividend or using a gift certificate, for a period of time. Second, the holder will retain this property until it is presumed abandoned under the unclaimed property statutes. Third, at the time of presumed abandonment, the state will take possession of the property. Fourth, in a small percentage of cases, the owner, defined by the ***138** unclaimed property statutes to include heirs and devisees as well as the initial owner at the time of presumed abandonment, may file a claim and obtain a recovery. All of these steps raise tax issues, as described below. At each step, resolution of the tax issues is complicated by the fact that the applicable tax doctrines are not designed for the kind of inadvertence or failure to act that creates unclaimed property.

III. FAILURE OF OWNERS TO ACT REGARDING THE PROPERTY

Most owners deal with intangible property regularly and claim intangible personal property promptly. Dividends, for example, are generally claimed within three to six months following payment date. [FN91] Such property will be claimed rather than unclaimed. Only property ignored by its owner runs the risk of being subject to unclaimed property statutes. Chronologically, then, the first tax question for unclaimed property is the income tax consequences for owners who fail to collect the funds when made available by the holders or who otherwise ignore their property.

A. Constructive Receipt

Many of the items subject to the unclaimed property statutes, including interest, dividends, and salary checks, would have been income if the apparent owner had in fact collected the amounts. [FN92] If we assume that the owners are individuals (which should be the case in the vast majority of instances), failure to collect these monies may not prevent them from being taxable to the owners. They may well be in constructive receipt of these amounts. Applying constructive receipt doctrine to these funds, however, points up contradictions in the doctrine itself.

Individuals are generally under the cash method of accounting. Under the cash method of accounting, "all items which constitute gross income (whether in the form of cash, property, or services) [are] included [in income] for the taxable year in which actually or constructively received," while expenditures "are to be deducted for the taxable year in which actually made." [FN93] The cash ***139** method does not ask when claims or obligations actually arose. It is "formal, mechanical, and easier for non-accountants to understand and implement." [FN94] The tax code permits cash basis accounting, because of its simplicity, even though "[t]ax theorists regard cash basis accounting as less accurate than accrual accounting, which takes into account the taxpayer's rights and liabilities." [FN95] Cash basis accounting is an issue of administrative simplicity. It is not, for example, consistent with the Haig-Simons definition of income.

At the same time, the cash method is subject to manipulation. The doctrine of constructive receipt operates as an anti-abuse measure to guard against cash method taxpayers playing fast and loose with the progressive rate structure and the concept of annual accounting. The regulations state:

> [I]ncome although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. [FN96]

"The most obvious candidates for constructive receipt treatment are uncashed dividend and salary checks . . . and similar items that could be turned into cash with a stroke of the pen but that the taxpayer deliberately or inadvertently fails to present for payment or otherwise process in the normal fashion." [FN97] The regulations state clearly, "Dividends on corporate stock are constructively received when unqualifiedly made subject to the demand of the shareholder." [FN98]

Some cases suggest that owners are in constructive receipt whatever the reason for their failure to receive the cash to which they were entitled. [FN99] Language from Loose v. United States [FN100] is particularly unyielding. There, the taxpayer was unable to clip and cash interest coupons because of a stroke that disabled him physically and mentally. [FN101] The Court nonetheless determined him to be in constructive receipt of the income. [FN102] It rejected the argument ***140** that the taxpayer's handicap prevented application of the constructive receipt doctrine:

> [T]he strongest reason for holding constructive receipt of income to be within the statute is that for taxation purposes income is received or realized when it is made subject to the will and control of the taxpayer and can be, except for his own action or inaction, reduced to actual possession. So viewed, it makes no difference why the taxpayer did not reduce to actual possession. The matter is in no wise dependent upon what he does or upon what he fails to do. It depends solely upon the existence of a situation where the income is fully available to him. [FN103]

As applied in Loose, the constructive receipt rule worked to the taxpayer's disadvantage. The Loose understanding of constructive receipt, however, is likely to benefit owners of unclaimed property. The constructive receipt doctrine "can be invoked by taxpayers to assign items to years before actual receipt, even if the statute of limitations has run on the year of constructive receipt." [FN104] Unclaimed property is unlikely to have been reported at the time it was constructively received. If owners could not be located to receive the monies in question, it is extremely improbable that they would have received a W-4 or Form 1099 and included the amounts in their income tax return. Thus, under this version of the constructive receipt doctrine, if owners eventually reclaim property that should have been reported under the doctrine of constructive receipt, they will owe no income tax on these amounts for past years if the statute of limitations has run. [FN105]

Other cases, however, seem to suggest that a taxpayer is not in constructive receipt of lost property without actual notice. [FN106] As a famous quotation regarding constructive receipt has it, "[a] taxpayer may not deliberately turn his back upon income and thus select the year for which he will report it." [FN107] In the case of unclaimed property, however, the taxpayer does not deliberately turn his back. The Tax Court explained in Furstenberg v. Commissioner that funds are considered available for taxpayer to draw on only if taxpayer has "notice . . . that the funds are subject to his will and ***141** control." [FN108] In Furstenberg, however, there was no attempt to give the taxpayer notice that a distribution from a trust fund was available to her prior to the date of her expatriation. [FN109] Holders of unclaimed property, in contrast, must attempt to give notice to owners. [FN110]

Even an attempt to give notice, according to some authorities, is not sufficient to invoke constructive receipt. In Davis v. Commissioner, the post office attempted to deliver to the taxpayer a check containing severance pay by certified mail on December 31, 1974. [FN111] The taxpayer was not at home. [FN112] She arrived home after the post office had closed, saw the notice of attempted delivery, and thought it would be a notice of increase in her rent. [FN113] She picked up the letter containing the severance pay on January 2, 1975. [FN114] The court held that she was not in constructive receipt of the severance pay in 1974. [FN115] It explained that a taxpayer has constructively received amounts only if the taxpayer has notice that the funds are subject to his will and control. [FN116] Where the failure to receive notice does not result from a conscious choice to postpone receipt of the funds until the following year, the court concluded, the doctrine of constructive receipt is inappropriate. [FN117] The court explained that the taxpayer had no actual knowledge or expectation that the income would be available to her in the earlier year. [FN118]

In many cases involving unclaimed property, owners also have no actual notice of their rights to such payments. Sometimes owners fail to receive notice through no fault of their own—negligence by holders or transfer agents produced the failure of notice. [FN119] Often, however, owners' own carelessness is responsible for this lack of notice. They fail to inform holders of new addresses, to open mail, to keep track of mail received. They simply forget ***142** about funds in banks, retirement accounts, etc. Owners whose property is eventually presumed abandoned may have ignored the notices sent by the holders. The owner lacks actual notice, not through conscious choice, but nonetheless because of the taxpayer's own failure.

If application of the doctrine of constructive receipt turns on actual notice of availability, whether or not owners had constructively received the unclaimed funds, may depend on the particular reason in each case why the owner did not receive the funds. If so, the results are perverse. Owners whose property is presumed abandoned because they ignored notices would have been in constructive receipt and, as a result of the statute of limitations running, likely not to be taxed upon any recovery. In contrast, an owner who failed to receive notice because of negligence of the holder, would not be in constructive receipt and taxable at the time of recovery. [FN120] Moreover, owners who fail to receive actual notice because of their own carelessness— their own unconscious action—as, for example, in notifying holders of changes in address are difficult to categorize under the authorities regarding notice as prerequisite to constructive receipt. Thus, the example of unclaimed property undermines "notice" as the touchstone for constructive receipt.

Even under the stricter standards of the Loose case, however, it is difficult to see how these funds are "fully available" to a taxpayer when, as in one typical situation, the transfer agent or corporation paying the dividend errs in giving notice and the owner does not know the funds exist. To say that the taxpayer who is a victim of such error is in constructive receipt—which in this case is likely to allow the taxpayer to avoid taxation upon later recovery—would force us to impose on taxpayers an affirmative obligation to maintain communication with those holders from whom the taxpayer might expect income. That is, considering accident in the context of constructive receipt raises the specter that this doctrine in fact implicitly places affirmative duties on taxpayers.

The example of unclaimed property also forces us to ask whether, if the purpose of the constructive receipt doctrine is to avoid taxpayer manipulation, we should put limits on its use when taxpayers invoke it to their advantage. Further, it exposes how the doctrine of constructive receipt may assume intentional action, intentional failure to act, or even inability to act, but not inadvertence on the part of taxpayers. When this assumption proves false, as it does with unclaimed property, the doctrine becomes unreliable. It may be that, when looking at the particular doctrine of constructive receipt in ***143** isolation, the benefits of an easy categorical rule that treats inadvertence the same way as intention outweigh any costs. Constructive receipt is only one doctrine. The example of unclaimed property asks us to examine the treatment of carelessness in a variety of tax settings. Such a broader view may lead to a different conclusion.

B. Abandonment

Other property potentially subject to the unclaimed property statutes does not represent items of income, but assets of the owners. This latter class would include stocks, bonds, insurance reimbursements, security deposits, even bank accounts. By ignoring this property, the owners would seem to be abandoning it. [FN121]

In some situations under the Internal Revenue Code, abandonment of property gives rise to a loss deduction. [FN122] Should, in theory, such a loss deduction apply here? Of course, such a deduction is unlikely to be actually taken on the owner's return. To take the deduction, the owner must be aware of the property and if the owner is aware of it, the property would not be abandoned. Unclaimed property laws apply only to owners who have lost track of their property; if they do not realize they own it, they will not know to take a loss deduction either. Such characterization of the presumed abandonment, however, is important for tax consequences under the tax benefit rule should the owner eventually recover the property, whether before or after the statute of limitations has run, as discussed further below.

Loss deductions for abandoned property are available only if certain requirements are met. First, the property must be held for use in a trade or business or in a transaction undertaken for profit. [FN123] Some categories subject to the unclaimed property statutes, such as utility deposits or gift certificates or travelers' checks, clearly would fail this requirement. Others, such as stock certificates, bonds, or interest-bearing bank accounts, might. Even for this second class of property, however, no loss would be allowed under current tax rules. [FN124] An abandonment loss is permitted only if the owner established an ***144** intent not to use the abandoned property again or to retrieve it for sale or other disposition. [FN125] Non-use is not sufficient. [FN126]

Thus, such unclaimed property is not abandoned property for federal tax purposes.

Yet again, the unclaimed property statutes reveal how ill-equipped are the substantive provisions of the tax code to deal with unintentional acts, with carelessness. Even if nowhere else, we would think that "loss" deductions would apply to "lost" property. Property, however, is lost for tax purposes only if we know it to be lost.

IV. UNCLAIMED PROPERTY IN THE HANDS OF HOLDERS

If owners do not claim their property, it will remain in the hands of the holders—the transfer agent for the dividends, the insurance company for the insurance claim, etc.—for at least the period of time, usually several years, until "presumed abandonment." [FN127] Chronologically, the next question is the tax treatment of unclaimed property while it is in the hands of the holders.

During that period of time, the property is subject to the claims of the owner. If property remains unclaimed at the time of presumed abandonment, all holders, whether large companies or small, are obligated to transfer these unclaimed funds to the state. Therefore, legally, all unclaimed funds in the holder's possession are subject to an offsetting claim by either the owner or the state on behalf of the owners. In practice, moreover, many businesses are unaware of the obligation to transfer these assets to the state. States, at least until very recently, have not devoted resources to enforcing the unclaimed property statutes vigorously. Audit efforts vary. For many holders, unclaimed property is a relatively permanent and unrestricted source of interest-free capital.

The tension between the law and practice under unclaimed property statutes complicates tax treatment. Tax treatment of holders is the one area where there are existing authorities. While some of these authorities emphasize the actual practice, others stress the content of the law, whatever the practice. The more recent authorities adopt the latter view.

Some early cases suggest that holders of unclaimed property must include the property in income unless they have been complying with unclaimed ***145** property laws. [FN128] These authorities, although directly on point, predate modern unclaimed property statutes, recent enforcement efforts, and an important Supreme Court decision regarding the tax consequences of offsetting obligations. [FN129] Under a later case, a General Counsel Memorandum, and the Supreme Court case, the legal obligation to turn over unclaimed property to the state appears to protect holders from having to include the property as income, however long they make use of it. Yet such treatment raises a host of practical and theoretical problems. Once again, the carelessness that underlies loss of property forces reconsideration of tax doctrines.

A. Existing Authorities

1. Unclaimed Property as Income

The earliest authority involving unclaimed property, Fidelity-Philadelphia Trust Co. v. Commissioner, [FN130] required the holder to include the unclaimed property in income. The case involved a bank, which, after fruitless attempts to locate the owners of inactive accounts, made funds from unclaimed deposit accounts available for general use by transferring the funds from a deposit liability account to surplus. The bank argued that its liability to the state under the escheat laws prevented the unclaimed deposits from being income to it. The Tax Court rejected this claim on the grounds that the taxpayer had never made reports under the escheat laws and that the Commonwealth of Pennsylvania had never enforced its escheat provisions against the bank. "The mere fact that it may, at some later time, be required to turn over such deposits to the Commonwealth does not prevent them from being income to the bank in 1948," wrote the Tax Court. [FN131] "If escheat proceedings should be initiated in some later year, petitioner may then be in a position to claim a deduction for funds surrendered." [FN132]

Similarly, in Colonial Wholesale Beverage Corp. v. Commissioner, [FN133] the Tax Court required bottle deposits taken by the petitioner in accordance with ***146** Massachusetts laws to be included in income when received. The taxpayer had argued against including the amounts in income in part on the grounds that the Massachusetts' abandoned property laws might require it ultimately to turn over the unclaimed deposits to the state. The Tax Court there denied exclusion because of the possibility the petitioner might at some future time be called upon to pay over unclaimed deposits to Massachusetts. It rested this decision on there being "no indication that petitioner has acknowledged the application of the escheat law to such deposits." [FN134]

In both these cases, the laws applicable to unclaimed property were not enforced and thus did not represent any practical limitation on the holder's right to or use of the funds. Later authorities involving holders in compliance with unclaimed property laws reach a different conclusion.

2. Unclaimed Property as Debt

Authorities in which holders have complied with unclaimed property laws conclude that unclaimed property does not give rise to income for the holder. Moreover, these authorities suggest that the very existence of unclaimed property laws produces this result, whether or not the holder has been complying with the unclaimed property laws.

In Bituminous Casualty Corp. v. Commissioner, [FN135] the Tax Court held that reserves for outstanding drafts and checks were not income to an insurance company when the insurance company regularly filed escheat reports and paid to appropriate states amounts with respect to this unclaimed property. The Court concluded that the company "has a clear liability to pay . . . either to the payee or to a State under the appropriate escheat laws." [FN136] It distinguished Fidelity-Philadelphia Trust on the grounds that the escheat laws had been ignored and thus the holder had no liability to repay. [FN137]

Similarly, in General Counsel Memorandum 36,076, [FN138] the IRS looked not at the degree of the taxpayer's compliance with state unclaimed property laws but simply at the substance of the state unclaimed property law. [FN139] It concluded that a stock brokerage firm, which had been aware of and ***147** complying with the law, was not required to accrue into income unclaimed dividends and interest. [FN140] The Memorandum explained that

> with respect to potential windfalls involving unclaimed bank deposits, unclaimed dividends held by brokers, and unclaimed premium refunds, both the courts and the Service have effectively recognized that such amounts are not includable in the taxpayer's gross income until the time when it is reasonable to assume that such amounts have ceased to be a true liability or to be regarded as such by the taxpayer. [FN141]

Under state law, unclaimed dividends and interest escheated to the state if still unclaimed after five years, and the IRS characterized these laws as self-executing. [FN142]

Since, "by operation of law all such dividends and interest constitute a liability . . . owed to the State," the amounts remained a true liability and were not income to the brokerage house. [FN143]

The existing authorities, then, are clear that holders complying with state unclaimed property laws do not have to include unclaimed funds as income. Treatment of holders who have not been complying with these laws is less clear. Under Colonial Wholesale Beverage and Fidelity-Philadelphia Trust, such holders would have income. Under the authority of Bituminous Casualty and General Counsel Memorandum 36,076, the legal obligation to the state may protect the holders from including unclaimed funds as income.

Basing taxation on the holder's knowledge of the unclaimed property laws and thus on the degree of state publicity and enforcement of the law, as does the first set of authorities, makes for difficulties in administering the tax system—unclaimed property might be income for holders in one state, but not another; income for some kinds of businesses but not for others; tax treatment might differ from year to year. If, as under the later authorities, state law is treated as self-executing, holders will be able to use unclaimed property as their own for decades without having to pay interest or to treat the funds as income.

*148 A relatively recent Supreme Court case, Commissioner v. Indianapolis Power & Light Co., [FN144] reinforces the implication of Bituminous Casualty that the holder's liability to pay the state, whether or not enforced, protects unclaimed funds from being included as income. The case involved the proper tax treatment by an accrual-basis utility of deposits it required from some of its customers. [FN145] For years after 1976, the utility, using a fixed formula to judge the customer's creditworthiness, required some five percent of its customers to deposit twice the customer's estimated monthly bill. [FN146] The utility commingled these deposits with other receipts and had full use and control over the funds. [FN147] For deposits held nine months or more, the utility paid the customers interest at a rate of 6%. [FN148] Customers who made timely payments for nine months or who satisfied the credit test could obtain a refund. [FN149] The refund would be made in cash or by check or, at the customer's option, be applied against future bills. [FN150] After seven years any unclaimed deposits escheated to the state. [FN151]

The Commissioner argued for treating the deposits as taxable advanced payments for electricity, because they secured the payment of future income. [FN152] The Supreme Court disagreed. [FN153] It emphasized the similarities between loans, which are excluded from income without question, and the deposits at issue in the case. [FN154] The Court explained that "these deposits were acquired subject to an express 'obligation to repay,' either at the time service was terminated or at the time a customer established good credit . . . both the timing and method of that refund are largely within the control of the customer." [FN155] The Court emphasized that the touchstone for inclusion in income was not unconstrained use but "whether the taxpayer has some guarantee that he will be allowed to keep the money." [FN156] The utility's right to retain the money was "contingent upon events outside its control," and the Court held "that such dominion as IPL has over these customer deposits is *149 insufficient for the deposits to qualify as taxable income at the time they are made." [FN157]

Actual experience with such deposits did not enter into the Court's conclusion. The Tax Court had explained that over the years at issue, between fifty-seven percent and sixty-nine percent of refunds were made by a credit to the bill, [FN158] but the Supreme Court did not even cite such statistics. [FN159]

The Supreme Court in Indianapolis Power made the obligation to repay key to excluding deposits from income. [FN160] When such reasoning is applied to unclaimed property laws, the potential state claim will prevent unclaimed property from being included in the holder's income, no matter how long the period between the holder identifying the funds as unclaimed and the state's possession of them. That is, all unclaimed funds become deposits awaiting payment to the owner or the state, since the holders have a legal obligation to turn over the funds. The unclaimed property in the hands of the holder is treated as if the holder had borrowed the money.

B. Critique

The position taken in Indianapolis Power that an obligation to repay qualifies receipts for treatment as debt has been sharply criticized. Although he wrote well before the Supreme Court decision, Professor William Popkin has offered an analysis that serves to question the Supreme Court's reasoning: "Tax is not always deferred on funds which the taxpayer is obligated to repay. An embezzler, for example, must pay tax in the year the money is embezzled." [FN161] As the Supreme Court has observed, "a taxpayer [who] acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction to their disposition," is taxable on the income whether or not under an unqualified duty and obligation to repay. [FN162] Neither the person who is the victim of embezzlement nor the person who has suffered unclaimed property has chosen to make a loan to another. Somewhat analogously, then, an owner who gives ***150** a holder use of unclaimed property only inadvertently rather than intentionally seems to undermine characterization of the relationship as debt.

Most of the criticism of Indianapolis Power, however, goes to the issue of interest on such so-called debt, and these criticisms are important for proper analysis of unclaimed property in the hands of holders. Professor Coven has argued that treatment of receipts as debt should be defined "by the extent to which obligations to incur future costs are recognized as offsetting the value of a receipt," and that therefore exclusion from taxation "should be limited to receipts that are offset by repayment obligations that bear stated interest at a market rate." [FN163] He would ignore the taxpayer's control over the repayment of principal, the factor emphasized by Indianapolis Power. He takes the position that only amounts subject to a market rate of interest should be excluded from income; to the extent that no such interest is paid, the cash receipt would be taxable. [FN164]

Other critics of Indianapolis Power believe that Professor Coven himself ignored unstated or implicit interest. For Professor Yin, the "'first premise' of the time value of money rules" is "that all deferred payment transactions include interest, either explicitly or implicitly." [FN165] Similarly, Professor Klein explains that payment of interest does not distinguish the categories of loan, advance payment, and deposit:

> In an arm's-length transaction, the value of a nominally interest-free (or below-market-rate) loan, deposit, or advance payment will be reflected in a price of some related part of the entire transaction. Thus, there can be no fundamental economic differentiation among loans, deposits, and advance payments according to whether there is an obligation to pay interest. [FN166]

***151** These criticisms have implications as to how holders of unclaimed property should be taxed. Under Professor Coven's test, because the holders do not pay interest on the use of unclaimed funds during the period they use the funds as such, they would have to include the amounts in income and then take a deduction when they are paid to the state. The treatment under Professors Yin's and Klein's tests is less clear because amounts of unclaimed property do not represent arms-length transactions, but the opposite—the failure of some bargain, whether it be for banking services, payment for services rendered, payment of dividends on investment, etc. That is, in the case of unclaimed property, implicit or explicit interest was paid by the holder to the owner of the funds according to a relationship that has ceased to exist.

The failure of the arms-length bargain for either explicit or implicit interest makes treatment of the unclaimed property as a loan particularly problematic. As a practical, although not a legal matter, the holder is freed from obligation to the owner regarding these funds. The holder, in many cases, has and makes use of unclaimed funds. When the holder does so, current law does not require the holder to hold any part of any income earned for payment to the missing owner or to the state on behalf of the owner. [FN167] In General Counsel Memorandum 36,076, the Service observed that the state unclaimed property law did not require the brokerage to pay the state "a fair charge for the use of unclaimed dividends or interest." [FN168] The General Counsel Memorandum did not take a stand on the issue:

> It should be noted that the public position of the Service of the tax consequences resulting from the free use of funds belonging to another is unclear. To our knowledge, in analogous situations involving unclaimed items of various types, the Service has never contended and no court has ever held that the possessor is liable for imputed interest on the free use of unclaimed items. [FN169]

Since this General Counsel Memorandum, Congress has amended the Internal Revenue Code by adding § 7872 to require imputation of interest at the applicable federal rate (AFR) for certain kinds of interest-free and low-interest loans. [FN170] Section 7872, however, applies only to gift loans, ***152** shareholder-corporation loans, employer-employee loans, and tax-avoidance loans, and thus does not in its current form apply to use of unclaimed property by holders. [FN171]

Although § 7872 does not apply to unclaimed property, the General Counsel Memorandum properly recognizes that, in theory, interest should be paid for the holder's use of such funds. [FN172] Holders of unclaimed property receive the tax advantage of exclusion from income accorded to debt; yet, for the period they use the unclaimed property as such, they do not have an obligation to pay interest in any form—implicit or explicit. Thus, if the use of unclaimed property is to be treated as a loan to the holders, the holders should owe interest on use of the funds to the owners of the property. Such imputed interest would itself become part of the unclaimed property reported to and then transferred to the state. That is, in theory, some of the holder's earnings should be deductible by them as interest paid and taxable at some point to the owners as interest received.

In most cases, holders do not pay interest to owners' accounts. Instead, holders themselves earn income on these amounts and pay income tax on the earnings. Holders become surrogate taxpayers for the owners. While depending on surrogates is less than theoretically pure, the federal tax code often makes use of surrogate or substitute taxation, particularly when administrative difficulties stand in the way of taxing the proper taxpayer. [FN173] ***153** Unclaimed property poses precisely such administrative difficulties—the proper taxpayer is lost—and thus is a prime candidate for surrogate taxation. Surrogate taxation is one tax doctrine that helps to deal with inadvertence and carelessness by shifting the tax burden to an identifiable taxpayer acting intentionally. Surrogacy is thus not simply a matter of administrative ease, but also acceptance of human frailty. Our tax system, whatever its economic or market-based rationale, must deal with flawed human beings. Surrogate taxation helps it to do so, and we should thus view surrogate taxation as more than a matter of administrative convenience.

Current law has evolved into a compromise. Holders do not have to include unclaimed funds in income at any time, but because of the obligation to pay the funds either to the owner or to the state, they are able to treat these funds as borrowed. At the same time, they are free in most instances to do this borrowing free of explicit or implicit interest. Moreover, although compliance is improving as states step up enforcement efforts, many holders, especially small businesses, do not know about, much less comply with, unclaimed property laws. This low level of compliance and holders' ability to use unclaimed funds interest-free raise questions about the appropriateness of the current tax treatment of unclaimed funds in the hands of the holder as a loan not subject to taxation. That is, the court in Bituminous Casualty Corp. may have been correct to say that a holder had no offsetting liability when the escheat laws imposing the liability had been ignored. [FN174]

Moreover, holders have at best an inadvertent loan. Owners give holders use of this unclaimed property unintentionally. As the Supreme Court suggested in James, perhaps some kind of intentional action on the part of the owner to give use of the funds to another should be a prerequisite to characterization of any amount as a loan. [FN175] Examination of the unclaimed property laws thus helps us to refine our very notion of debt.

*154 The accidental quality suggests that characterization of these amounts as a taxable windfall to the holder after some period of inactivity may be more accurate. The Uniform Unclaimed Property Act, after all, describes unclaimed property as a "windfall to the holders." [FN176] Windfalls are clearly taxable as income. [FN177] In the case of holders, moreover, considerations of economic efficiency may come into play. Property sometimes is unclaimed because holders failed to send notices to the correct addresses or otherwise keep track of owners. Being subject to taxation on unclaimed property, rather than treating the funds like a loan, should give holders an incentive to exercise care in keeping track of owners.

In sum, although the current law regarding tax treatment of unclaimed property in the hands of the holder seems clear, there are significant questions as to whether it achieves the proper result. Even more significantly, the issues raised by unclaimed property suggest that we rethink our notions of debt to require some intention on the part of the taxpayer to make a loan. Again, this analysis demonstrates that the tax code is ill-equipped to deal with inadvertence.

V. UNCLAIMED PROPERTY IN THE HANDS OF THE STATE

Holders must turn over to the state property presumed abandoned. When the state acquires unclaimed stock or bonds under unclaimed property statutes, for example, dividends on that stock or interest on the bond continue to accumulate until the state sells the asset. Both the receipt of earnings and the act of sale raise tax questions. In addition, states generally deposit the proceeds of such sales, along with unclaimed cash, in the general fund, reserving only a small amount for potential claims by owners. The next set of tax issues, then, involves the treatment of the unclaimed property once the state takes possession of it.

***155** Under the UUPA, "the State does not take title to unclaimed property, but takes custody only, and holds the property in perpetuity for the owner." [FN178] That is, the states see themselves as acquiring an obligation and not the property itself. [FN179] They not only return the property to owners who claim it, but also undertake efforts to find the owners and reunite them with their property. [FN180] In Connecticut Mutual Life Ins. Co. v. Moore, [FN181] the Supreme Court described the state as "a conservator" when claiming property under a custodial unclaimed property law. Similarly, the 1995 draft of the Preface to the Uniform Unclaimed Property Act explained, "the State acts as a conservator of the lost owner's property and the Act is akin to a succession statute." [FN182] One of the two leading treatises explains, "The state succeeds to whatever rights the owner of the property may have." [FN183] At the same time, the unclaimed property laws have as one of their purposes giving the states use of these funds. [FN184]

The various goals and purposes of state unclaimed property laws make a variety of characterizations possible. In the case of unclaimed property, the uncertainty as to the proper tax characterization arises not only because of the multiple purposes of the Uniform Act, but also because inadvertence does not fit neatly into our substantive tax rules. Moreover, operation of the state unclaimed property laws raises questions about fiscal federalism, how the federal government should treat state programs when the state claims to be acting on behalf of its individual citizens. The state might be seen as having borrowed the money from the owner, as a custodian of the money so that all earnings on it properly belong and should be taxed to the owners, as a fiduciary required to treat the unclaimed property as held in trust and subject to the income tax rules applicable to trusts—rules that do accommodate human frailty—or as itself the owner of the funds.

A. The State as Representative for the Owner

Under the UUPA, the state "takes custody only, and holds the property in perpetuity for the owner." [FN185] Insofar as the state holds on behalf of the owner, it would act as the representative of the owner and might be taxed as such rather than as the sovereign. If the state acts simply as custodian of the unclaimed funds, it could be seen as an agent of the owner. As an agent, the state would treat all income from the property as belonging to the principal and as properly reported on the principal's tax return. If the state is a custodian for the owner, all income earned on the property belongs to the owner, and would currently be taxable to the owner each year. Yet, as explained above, not all states pay interest on all unclaimed property that is eventually claimed and no state pays over all the income earned on the property. Principals, moreover, control agents, and here the unknown owners have no control. [FN186]

The state assigns to itself a responsibility greater than that of an agent. When the states acquire the unclaimed property, they, instead of the holders, benefit from the property. States assert extensive powers over unclaimed property. They transfer the vast majority of unclaimed funds to general revenue or other uses, retaining only a few hundred thousand dollars for potential claims by owners. [FN187] In only some instances do the states credit the account of owners with any earnings, and those earnings will generally be less than the state's earning on the funds. [FN188] If states acquire unclaimed property other than money, particularly stock, they sell it. [FN189]

The Supreme Court has characterized the state in this role as "conservator" of the property. [FN190] Under the tax code, caretakers such as "custodians, escrow agents, receivers administering property subject to litigation" often "have a large measure of discretionary authority in managing ***157** the assets entrusted to them and can be regarded as fiduciaries for the beneficial owners." [FN191] Tax regulations define a fiduciary as "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person." [FN192]

The definition of "trust" in the tax regulations seems to capture nicely state administration of unclaimed property laws:

> Generally speaking, an arrangement will be treated as a trust . . . if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit. [FN193]

The notion of trustee, like the notion of surrogate taxpayer, permits the tax law to deal with inadvertence, unawareness, and carelessness.

Fiduciaries, however, have a variety of responsibilities under the common law. Trustees, for example, have a responsibility to earn income on principal. [FN194] If the state is in fact a conservator, its failure to pay market-rate interest at least on the funds that are eventually claimed is particularly troubling. Failure to earn income on funds is failure to preserve it. Trustees have a duty to keep trust property separate and not to commingle trustee funds with other funds. In most jurisdictions, a corporate trustee may commingle trustee funds, so long as all trust assets are in a common trust fund. [FN195] The UUPA, in contrast, recommends that state administrators reserve only a small amount—at least $100,000—in a trust fund for any claims of owne[illegible] [FN196] The UUPA envisions that the vast majority of the unclaimed funds are transferred to the general revenue funds of the state and are not held in trust. [FN197]

Moreover, the Internal Revenue Code itself assigns fiduciaries a variety of duties. They must give written notice of the fiduciary relationship to the IRS. [FN198] They must file a notice of termination of fiduciary relationship upon ***158** completion of their duties. [FN199] In some situations, custodians and conservators would have an additional obligation: to file an income tax return. Under § 6012(b)(2), "[i]f an individual is unable to make a return . . . the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual." [FN200] The owner of unclaimed property, although likely making a return regarding other income, is unable to make a return regarding this property. It is unclaimed property precisely because the owner is unaware of ownership. If it is the fiduciary of such property, perhaps the state should make a return.

Thus, while the unclaimed property laws describe the state as acting on behalf of the owner, the state's behavior is not consistent with such a characterization. Nor would such behavior be practical, given the small percentage of owners who seek return of unclaimed property. Estimates put the total amount of property returned by the states at only four percent of total collections, [FN201] and the percentage of property currently returned as a percentage of property currently collected as approaching twenty-five percent. [FN202] Requiring the states to segregate these funds, invest them, and credit all earnings to them would be cumbersome and wasteful.

Furthermore, the usual rules for fiduciaries under the common law or the Internal Revenue Code, much less state statutory obligations, do not apply to states in their sovereign capacity. For the federal government (either the Internal Revenue Service or Congress) to require states to pay interest, file returns, and carry out other duties required by characterization of the state's role as a fiduciary would raise a host of difficult questions of federalism and comity. To a considerable extent, the role of sovereign overlaps with the concept of trust. Governments are, at least in some loose sense, fiduciaries for their citizens. The fit is less perfect, however, when governments say they are acting on behalf of citizens in their individual capacity, the very claims states make under their unclaimed property laws.

B. The State as Borrower or as Owner

The tests articulated in Indianapolis Power may make the state a borrower of these funds from the owner rather than a fiduciary of the owner. Like the utility deposits in that case, the unclaimed funds are "acquired subject to an express 'obligation to repay'" to the owner (which includes heirs or devisees of the original owner) at any time. [FN203]. The state has no guarantee that it will be able to keep the money. Upon demand of the owner, it must be returned. Until such a demand is made, the state has free use of the unclaimed funds. As borrower, the state would be free to use the funds as it sees fit, whether for state projects or to earn income.

Nonetheless, several considerations caution against characterizing unclaimed property in the custody of the state as borrowed from the owners. The first concern, discussed earlier, [FN204] is whether characterization as a loan is appropriate when the lender had no intention to make a loan. The second is the failure of the state to pay a market rate of interest for use of this property to owners who do eventually reclaim it. [FN205] Although, as discussed above, Supreme Court case law does not require payment of interest in order to characterize a relationship as a debt, this aspect of the Supreme Court case has troubled many commentators. The failure of the state to pay interest underscores the concerns raised earlier about the relationship between debt and payment of interest. [FN206]

Practical considerations underscore this concern, just as they did for treatment of holders. Only a small percentage of owners seek return of unclaimed property. Although the Supreme Court in Indianapolis Power looked to legal obligation and not to actual use of funds at issue to categorize a relationship as debt, in the case of unclaimed property the small return percentage means the state's legal obligation has limited substance. Again, questions about the Supreme Court's decision raise questions about characterizing the state as having borrowed this unclaimed property.

For holders, the difference between borrowing unclaimed property and owning it is important for purposes of taxation. That difference determines whether or not the holder is liable for federal income tax on the unclaimed property. States, in contrast, are generally not liable for federal income tax. [FN207] Although the example of unclaimed property may make us question the current framework for excluding the income of state and local governments when they claim to be acting on the behalf of individual citizens, under current law, the difference between the state owning unclaimed property and, as happens in most cases, the state's indefinitely borrowing the property may be very small indeed. For many purposes, the categories of state borrowing and state ownership collapse. As discussed below, [FN208] however, even under current law, whether the state is characterized as borrowing or owning the property could have significant consequences for the income and estate tax liabilities of owners who ultimately make successful claims from unclaimed property funds.

Nonetheless, although the state does not take title to unclaimed property but holds it for the benefit of the missing owner, characterizing the state as owner of the unclaimed funds for federal tax purposes avoids many difficulties. If the state is acting on behalf of the missing owner, all earnings on the unclaimed assets should belong to the missing owner and the state should report such earnings. If the state is borrowing the property from the owner, the owner would expect at least some interest on the loan. [FN209] Characterizing the state as owner recognizes the extensive powers the state asserts over the unclaimed property and validates the power of the state to sell unclaimed assets and to transfer such property to general revenue funds. The state as the owner avoids questions about the state's responsibility to fulfill a fiduciary's duties under the tax code and recognizes the fact that only a small percentage of unclaimed assets are returned to their owners.

Treating the state as owner of the unclaimed property in its hands makes the state the surrogate taxpayer for the missing owner. As discussed earlier, surrogate taxation offers an approach for dealing with inadvertence and ***161** missing taxpayers and thus may be appropriate here. In this case, however, the surrogate is not subject to federal income tax and is taxed at a zero percent rate. Thus, from the point of view of federal revenue, the state as surrogate is not a neat substitute for a taxpaying citizen.

The historical development of unclaimed property laws supports treating the state as owner. Before the advent of modern unclaimed property laws, unclaimed property escheated to the state absolutely. Missing owners had no opportunity to file claims. Under a true escheat statute, there would be no question about treating the state as an owner. Considerations of comity and federalism argue against changing this federal tax result because the states have extended additional rights to their citizens.

Unclaimed property laws have a variety of purposes. The state is to act on behalf of the owner and also to use the unclaimed property for itself. These differing purposes make several different characterizations plausible for tax purposes—the state could be a borrower, a fiduciary for the apparent owner, or the state could be the owner of the property of which it has taken custody. One newspaper article has described whether the apparent owner or the state owns unclaimed property while the state takes care of it as a "key question." [FN210] No one characterization adequately addresses the various roles the states play in connection with this property. For example, while characterizing the state as owner or borrower of the property seems to be the most consistent with the way the state treats the property, and also avoids troublesome questions about taxation of any earnings on the unclaimed property, such characterization is nonetheless inconsistent with statutory language specifying that the state holds the property as custodian on behalf of the missing owner. Such characterization requires ignoring other aspects of unclaimed property law, such as the state's duties to the owners and legal title, upon which ownership for tax purposes so often turns. [FN211] These difficulties arise because the owner is missing through carelessness on the part of either the owner or the holder. When the owner is missing, the tax law finds itself in a quandary.

VI. RECOVERY OF UNCLAIMED PROPERTY

Owners, who are defined for purposes of the unclaimed property statutes to include heirs and devisees, [FN212] do sometimes recover unclaimed property. To make a recovery, owners must learn that the state holds the property as abandoned and follow the necessary procedures to prove their right to it. Owners must affirm under penalty of perjury that they own the property claimed, produce the stock certificate if found or certify that they have not transferred the instruments if not found. [FN213] Recovery of such property raises its own set of federal tax issues.

At one time, such tax issues had little if any practical impact, however intriguing the proper treatment may be as a matter of theory. States did not enforce their unclaimed property statutes vigorously. Under earlier versions of most unclaimed property statutes, property was presumed abandoned only after seven years of inactivity. [FN214] In general, the Internal Revenue Service has only three years to assert a "deficiency," [FN215] which is generally defined as additional taxes owed because of an error on the return. [FN216] Thus, even in the unlikely situation in which the original or a subsequent owner did recover property, the statute of limitations on any tax liability would have run. Although the period is extended to six years if the taxpayer omits from gross income more than "25 percent of the amount of gross income stated in the return," [FN217] most claims are small. The chief of Delaware's unclaimed property office has stated, "You might be looking at $10 here and $15 there." [FN218] Other states have larger average claims. California reports its average claim amount is $1,200 and Illinois reports $1295. [FN219] In any case, the consequences for the tax system as a whole are significant. Moreover, some claims are large. [FN220] For those individuals with large recoveries, individual tax consequences will also be significant.

Newer versions of unclaimed property laws shorten the period for presumed abandonment, [FN221] and states have increased efforts both to take possession of unclaimed property and to identify the owners of the property. [FN222] States now regularly publish lists in newspapers, hire professional search firms, post names on the Internet, and conduct outreach programs, "especially when the amounts are large." [FN223] For example, since the spring of 1998, New York's unclaimed property office has operated booths at "high pedestrian traffic areas like train stations and racetracks," [FN224] and New Hampshire publishes names of people owed unclaimed property in The Union Leader and has a booth at the Hopkinton Fair. [FN225] As a result, it is becoming more likely for unclaimed property to be claimed by an owner before the expiration of the period for asserting a deficiency. For example, an owner may learn that the state has taken possession of dividends unclaimed for three or five years. Even if the statute of limitations has run for those dividends, the owner may well realize that there are also dividends to be claimed for the last two years, including the immediately preceding year. Occasionally, the dividends or other assets recovered may be so large as to trigger the six-year statute of limitations. [FN226] Heirs going through a decedent's papers may discover unclaimed property shortly after the original owner's death and thus long before the assessment period has expired for the estate tax return. The practical impact of the proper tax treatment of these amounts has grown and will continue to grow.

Money claimed from the state may represent recovery of principal, interest or dividends paid on the lost property, gain upon sale by the state, or ***164** interest paid by the state. The claimant may be the original owner, that is, the person who lost the asset, or that owner's personal representative, heirs or devisees. Interest paid by the state may have accrued both before and after the apparent owner's death. Thus, recoveries themselves involve not only income tax, but also estate tax considerations.

A. Recovery by the Initial Owner

1. Recovery of Principal

The portion of a successful claim representing either the original owner's investment or amounts that should have been taxed under the doctrine of constructive receipt would be recovery of capital. As recovery of capital, these amounts are not subject to income tax. General principles regarding recovery of capital would seem to call for this conclusion, but, as with the case of constructive receipt, the involuntary and inadvertent nature of the loss of property raises questions about the tax doctrine.

Clark v. Commissioner is the classic case for the proposition that recovery of capital does not result in taxable income. [FN227] There, a taxpayer received money from his tax counsel to compensate him for a loss in the form of greater tax liability suffered on account of erroneous advice given by the tax counsel. [FN228] The Board of Tax Appeals held that the money received was not taxable:

> So long as petitioner neither could nor did take a deduction in a prior year of this loss in such a way as to offset income for the prior year, the amount received by him in the taxable year, by way of recompense, is not then includable in his gross income

because the lawyer's action caused "a loss which impaired petitioner's capital." [FN229]

Revenue Ruling 81-277, [FN230] which treats recovery from a contractor for failure to perform under a contract as return of capital rather than gross income, expands on this reasoning. It states, "Inherent in section 61 of the Code is the concept of economic gain. For a taxpayer to have income under section 61, there must be an economic gain that benefits the taxpayer ***165** personally." [FN231] Citing Clark, it continues, "Payments by the one causing a loss that do no more than restore a taxpayer to the position he or she was in before the loss was incurred are not includible in gross income because there is no economic gain." [FN232]

According to Bittker and Lokken, Clark's rationale is plausible "only where the loss is nondeductible," as, for example, "because the loss is not within any category of deductions." [FN233] Clark thus can be seen as a variation of the tax benefit rule. Under § 111(a), the statutory codification of the judge-made tax benefit rule, "Gross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter." [FN234] In other words, recovery of an item must be included only to the extent its loss produced a tax benefit. In one classic example of the tax benefit rule, if a lender recovers payment on a debt it had deducted as a bad debt, the repayment must be included in income. Under the statutory tax benefit rule, even if there is a deduction for a loss, recovery is not included if the deduction did not produce a tax benefit. [FN235] As discussed earlier, recovered unclaimed property was never abandoned for federal tax purposes. No deduction was available or taken for its loss; thus, there need not be an inclusion of the recovery.

As Professor Zelenak has written, Clark treats identically a person who receives an excludable amount and a person who does not, even though the person who receives the amount is in a better economic position than the person who does not and even though it puts the person who recovers in the same position as he would have been if the loss had been deductible. [FN236] Professor Zelenak, following Professors Bankman and Klein, contrasts someone who recovers, as did Clark, $20,000 from the tax preparer with someone who finds $20,000 on the street. [FN237] Professor Zelenak explains that Clark applies when there is a "nexus between loss and recovery." [FN238]

Under this test, Clark would clearly apply to unclaimed property, since the nexus is particularly strong. Both statutory language of unclaimed property laws and cases interpreting these laws treat these funds as recovery by the owner of the owner's property. A key purpose of unclaimed property statutes, according to one court, is "to reunite owners with unclaimed funds or property" because the "State, through the Controller, acts as the protector of the rights of the true owner." [FN239] The owner must prove ownership of the property.

But again, such a conclusion based on application of existing tax doctrine may be too facile. Applying the tax benefit doctrine to unclaimed property forces reconsideration and refinement of this tax doctrine. Recovery of capital under the principles of Clark or the tax benefit rule frequently involves a mistake of judgment on the part of the taxpayer. The taxpayer errs in concluding that his tax preparer is knowledgeable or that a particular borrower is a good risk, or that a party to a contract will perform. Such errors in judgment, however, nonetheless involve voluntary and intentional acts. The taxpayer hires the tax preparer, decides to make the loan, hires the contractor and depends on their expertise. In contrast, recovered property is property that the owner has unknowingly lost through neglect, carelessness or inadvertence. As a treatise explains, "It is property which the owner has unwittingly suffered to pass out of his possession and of whose whereabouts he has no knowledge." [FN240] The owner, having had no idea he or she owns the property, can have no expectation of recovering the property. In fact, the property is "presumed abandoned" and the state has asserted control over the property, so much so that the state could be considered the owner of the property. [FN241] Using the comparison from Bankman and Klein, it is more as if the owner had found property someone else had lost than recover his money from his tax preparer. If so, the statutory rights of recovery given the owner should be characterized as a windfall and taxable as such.

Once again, the example of unclaimed property suggests that because standard tax doctrines assume that taxpayers make intentional voluntary acts, applying such tax doctrines to situations involving inadvertence may distort the purpose of the doctrines. Unclaimed property does not conform to the assumption underlying the tax doctrine and thus application of the tax doctrine may not be appropriate. If such is the case, the assumption that the taxpayer ***167** has acted intentionally in order to apply the tax benefit doctrine of intentional acts needs to be made an explicit part of our understanding of the doctrine.

2. Dividends, Interest and Gain or Loss

Reclaimed property includes not only recovery of principal but also of dividends or interest on unclaimed financial assets that accrued prior to sale by the state. In addition to interest or dividends paid by private businesses on unclaimed assets, successful claimants in some states will receive interest on at least certain kinds of claims for the period the state held the property. [FN242] These amounts again raise the questions of constructive receipt. If owners had been in constructive receipt of such earnings (and the statute of limitations had run), there would be no additional tax upon recovery. If they had not been in constructive receipt, they would owe tax at the time of recovery.

The constructive receipt issue involved in recovery differs from the constructive receipt issue discussed earlier. The aspect of constructive receipt important in Part I involved the relationship between taxpayer knowledge and failure to act to claim property. The issue involved in recovery of unclaimed property is the kind of action required of the owner in order to prove the claim. Under the regulations, "income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations." [FN243] In contrast, an insubstantial condition, such as submitting a document for cancellation or even a requirement that a routine fiduciary bond be filed, [FN244] does not prevent constructive receipt.

Filing a claim under the UUPA may not be more onerous than many a ministerial act required in connection with many transactions involving assets. Owners must affirm under penalty of perjury that they own the property claimed, to produce the stock certificate if found or to certify that they have not transferred the instruments if not found. [FN245] It is less onerous than, for example, having to obtain and file a fiduciary bond.

Nonetheless, the requirement here that a claim be filed seems to be more than a ministerial act. The filing of the claim does not guarantee receipt of the ***168** funds. Under the UUPA, the state administrator must consider the claim and can deny it. [FN246] The administrator can hold a hearing and hear evidence. [FN247] Discretion and judgment are involved. The statutory procedures include a panoply of due process protections. For example, owners whose claims are denied can file a suit against the state administrator. [FN248]

If the requirement that a claim be filed and allowed by the state administrator is characterized as a substantial limitation, interest paid by the state would not have been constructively received earlier and would be subject to income tax in the year it is actually paid. Taxing owners who recover property on all the interest they receive when it is paid to them, however, is a mixed blessing. If the interest were deemed constructively received and if the state had held the property for a period beyond the statute of limitations, owners who reclaimed their property would be better off than characterizing the amounts as not having been constructively received. If the statute has not run, constructive receipt would involve interest on underpayment and possibly penalties for the owner recovering the property. [FN249]

Again the doctrine of constructive receipt plays out very oddly when applied to unclaimed property. Most taxpayers will not make claims until the three-year statute of limitations has run and thus would prefer that the amounts be deemed to have been constructively received. That is, a doctrine that is intended primarily to protect against taxpayer abuse would in this case shield taxpayers from taxation. [FN250]

Even if constructive receipt did not shield them, owners who make successful claims would be shielded from federal income taxation if such interest were deemed tax-exempt as interest on a state bond under § 103. Section 103 specifies that "gross income does not include interest on any State or local bond." [FN251] Section 150(a)(1) defines "bond" to include "any obligation." [FN252] The legislative history specifies that sale agreements, installment purchase agreements, finance leases, and other evidences of debt issued pursuant to a governmental unit's borrowing power are to be treated as bonds. [FN253] While most bonds must be registered to be tax-exempt, ***169** § 149(a)(2)(A) exempts from the registration requirement a bond that "is not of a type offered to the public." [FN254] If the state is deemed to have borrowed such funds pursuant to its borrowing authority, then any interest paid by the state could be tax-exempt.

Is this payment of interest pursuant to state unclaimed property statutes pursuant to the state's borrowing power? While payment of interest is clearly authorized under various state unclaimed property statutes, these statutes, at least in their current form, do not characterize the state as issuing any kind of obligation under its borrowing power. There is no agreement between the owner and the state. [FN255] Thus, it is far from clear whether such interest can be excluded under § 103. State administrators, by issuing 1099's, [FN256] seem to assume that it is not. [FN257]

Moreover, the lack of any agreement between the state and the owner raises the more general question discussed earlier—whether we characterize an inadvertent loan, a loan that the lender does not intentionally make, as a loan for tax purposes at all. [FN258] The tax questions raised at the end of the unclaimed property chronology, recovery of property by the owner, rehearse ***170** the questions raised at the beginning, the owner's failure to take action regarding the property.

B. By Personal Representative, Heirs or Devisees of Initial Owner

Owners for purposes of unclaimed property statutes include those with legal or equitable interest in the property as well as legal representatives. It is easy to imagine relatives cleaning up the house after the demise of an elderly relative and discovering long-forgotten bank books or stock certificates. When unclaimed property is claimed by personal representatives, heirs or devisees, additional tax issues arise. If the state is considered the owner of the unclaimed property, for example, recovery by heirs of the owner could be characterized as a windfall subject to income taxation. In the case of heirs, however, estate tax issues become particularly salient.

One important question is the inclusion of these amounts in the decedent owner's gross estate. The regulations, for example, state:

> The Federal estate tax is neither a property tax nor an inheritance tax. It is a tax imposed upon the transfer of the entire taxable estate . . .. Escheat of a decedent's property to the State for lack of heirs is a transfer which causes the property to be included in the decedent's gross estate. [FN259]

Moreover, transfer is defined broadly for purposes of the estate tax. Intestate transfers, which, like unclaimed property laws, involve failure to act rather than any intentional act on the part of the decedent, are subject to estate tax.

The tax regulations also explain that the gross estate includes "the value of all property, whether real or personal, tangible or intangible, and wherever situated, beneficially owned by the decedent at the time of his death." [FN260] Furthermore, "property is includible in the gross estate of the principal, even if an agent or nominee is the owner of record." [FN261] Thus, whether the decedent's gross estate includes these amounts may depend on whether the state itself is to be treated as the owner of the property, borrower of the property, or as a fiduciary for the original owner. That is, is the decedent or the state the transferor of this property?

As explained above, the state considers itself to be holding the unclaimed property transferred to it as custodian for the benefit of the owner. If the state is holding the property for the benefit of the deceased owner, such assets ***171** should be included in the decedent's gross estate, even if the claims have not yet been filed and the state has not yet paid the claims. Similarly, if the state is treated as having borrowed the property, it owes a debt to the decedent that can be valued and included in the gross estate.

If the state rather than the apparent owner is deemed to be the owner of this property, heirs or devisees of a decedent might argue that the property was not owned by the decedent at the date of death and need not be included in the gross estate. They would further argue that they made the claim as owner and that such ownership was established only after the state accepted the claim.

At the same time, other aspects of unclaimed property laws undercut such a characterization. In particular, unclaimed property statutes define owner as "a person who has a legal or equitable interest in property subject to this [Act] or the person's legal representative." [FN262] Any heirs or devisees own the property only because of their relationship to the decedent, and the decedent did have a claim to the unclaimed property, a claim that now can be valued. Moreover, it is a truism of the federal estate tax that its reach turns largely on issues of state property law. [FN263] Thus, the quoted statement may in and of itself call for including recovered unclaimed property in the decedent's gross estate.

Other considerations, however, lead to the opposite conclusion. Section 2033, the main provision of the estate tax, [FN264] includes, but is not limited to, property that the decedent owns outright at death. In two recent Technical Advice Memoranda, [FN265] the IRS concluded that the gross estate of each decedent included the value of illegal property in their possession. Both memoranda justified this inclusion on the grounds that even if the decedents lacked legal title, they possessed the economic equivalence of ownership—they enjoyed the use and economic benefits of the property. [FN266] Technical Advice Memorandum 92-07-004, for example, quotes the Supreme Court, "Taxation is . . . concerned with . . . the actual command over the property taxed—the actual benefit for which the tax is paid." [FN267] The Tax Court has observed that "we do not believe a taxable event can occur for gift *172 tax purposes unless there is first and in fact an act of transfer by the donor; and there can be no act of transfer unless the act is voluntary and the transferor has some awareness that he is in fact making a transfer of property, that is, he must intend to do so." [FN268] Unclaimed property is the mirror image of illegal property. Individual owners may, technically, retain legal title. They have, however, no command over the property and enjoy no benefit from it. In such a case, the policies underlying the estate tax suggest that gross estate should not include unclaimed property, even if heirs recover the property before the statute of limitations has run for purposes of the estate tax.

Thus, the estate tax consequences are uncertain. [FN269] As with the other tax issues raised by unclaimed property laws, considering the estate tax consequences of this property invites us to confront basic questions about our tax laws, questions so basic that we take the answers for granted and do not examine our assumptions. How far do the estate tax rules extend? Should they apply to property when decedents had no idea that they had rights to the property? In particular, the example of unclaimed property recovered by relatives of a decedent underscores basic questions about our transfer tax system. Characterizing a decedent as transferring property the decedent has lost is uncomfortable. Yet, relatives who recover such property do have an accession to wealth and allowing such property to escape the transfer tax is also unsatisfactory. The example of unclaimed property lends support to those ***173** who argue in favor of an accessions tax instead of an estate tax. As with the income tax, the treatment of unclaimed property raises issues about the appropriate tax base.

VII. CONCLUSION

One response to this study would be a call to Congress or the IRS to establish specific and special rules for loss and recovery of unclaimed property. [FN270] The more important implications of the study, however, are far broader. Looking at carelessness through the lens of such tax doctrines as what constitutes debt or constructive receipt exposes how many tax doctrines assume that actions are the result of voluntary and conscious choice when in fact such doctrines also must be applied to actions that are not necessarily so. The billions of dollars in unclaimed property underscore just how often inadvertence occurs.

Professor Kelman believes that "the trigger to taxability ought to be a person's voluntary entrance into the market," [FN271] and thus, in order to avoid forced marketing, he would not tax imputed income from leisure or services provided within the household. This study of unclaimed property shows how frequently the tax system takes for granted that the taxpayer has voluntarily entered the market. Our tax system assumes taxpayers are rational rather than fallible with "severe restrictions on cognitive capacity, attention span, and time that preclude assessing all relevant considerations in a 'rational' manner." [FN272]

Considering the tax consequences of unclaimed property, however, has important tax lessons for the tax system as a whole. In a general way, it serves as a reminder that, while the tax system generally deals with market transactions, those conducting the transactions are human beings subject to limitations. It suggests that the Haig-Simons definition of income fails to address, much less answer, some crucial questions regarding a tax base and tax system. It helps us to highlight those tax doctrines, such as surrogate taxation or the tax rules applicable to fiduciaries, that allow for human carelessness. Doctrines that have been treated simply as compromises for reasons of administrative ease take on a new meaning and prominence as a reflection of taxpayers' psychological makeup.

This study demonstrates the need for more of our substantive tax laws to be designed with real people and their real limitations in mind. [FN273] More specifically, it suggests that the contours of many tax doctrines be limited to voluntary, or at least conscious, actions. Of special significance would be rethinking our notion of debt to require some conscious intention on the part of the taxpayer to make a loan. The lesson of unclaimed property statutes teaches that scholars, judges, and policymakers establishing or interpreting any tax doctrine should voluntarily and consciously consider whether that doctrine appropriately applies to careless or inadvertent actions.

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[FN1]. Deborah Mendenhall, Strike It Rich; Here's How to Stake Your Claim to Treasures You Didn't Even Know Existed, CHI. TRIB., Apr. 13, 1998, at C1. Another author puts the number at 1 in 10. DAVID W. FOLSOM, ASSETS UNKNOWN: HOW TO FIND MONEY YOU DIDN'T KNOW YOU HAD vi (1996). The author checked the list of California residents with unclaimed property against the names of all her colleagues and found a little under 10% of her faculty had unclaimed property, most often unclaimed insurance reimbursement checks. My colleagues in turn looked on the list and found money for many friends and family.

[FN2]. FOLSOM, supra note 1, at vi.

[FN3]. Thus, unclaimed property laws refer to these private businesses holding unclaimed funds as "holders." See text infra p. 11. See text infra p. 11 for a list of the kinds of property subject to these laws.

[FN4]. See generally ANTHONY L. ANDREOLI & J. BROOKE SPOTSWOOD, GUIDE TO UNCLAIMED PROPERTY AND ESCHEAT LAWS (2d ed. 1993). The period varies from asset to asset and state to state. "As a result of the states' awakening to the vast potential in unclaimed property revenues, they have viewed the holding periods with an eye toward increasing the dollar volume reported by holders of unclaimed property" and "have reduced time period on certain types of property to three years, and in some cases one year." Id. at 13-16. In particular, New York, California and Massachusetts have reduced the holding period below five years for most types of property. In these states, the holding period is generally three years. See id. at NY-2, MA-2, CA-2.

[FN5]. Folsom estimates that the states hold more than 30 billion dollars acquired from private parties, such as banks, insurance companies, and transfer agents. See FOLSOM, supra note 1, at 24-25. In 1997, Money Magazine estimated the number as closer to $35 billion. See Joan Caplin, Have You Claimed All the Money Belonging to You?, MONEY, Dec. 1997, at 106. The federal government is the largest holder of unclaimed property in the form of federal pensions, savings bonds and tax refunds. See FOLSOM, supra note 1, at vi. See also GOVERNMENTAL ACCOUNTING OFFICE, UNCLAIMED MONEY: PROPOSALS FOR TRANSFERRING UNCLAIMED PROPERTY TO STATES, AFMD 89-44 (May 1989). The GAO found that federal agencies varied considerably in their efforts to establish procedures for finding and returning amounts owed. Id. at 25.

[FN6]. See Jayson Blair, Reuniting New Yorkers With Forgotten Billions, N.Y. TIMES, July 5, 1998, § 1, at 16; California State Controller's Office, Unclaimed Property Program Description, (11/8/00), available at http://www.sco.ca.gov/col/ucp/bbs/desc/; News Release, Office of the California State Controller, PR Newswire, May 21, 1998, available in LEXIS, News Library, current news File. New York last year returned $60 million to 60,000 claimants; California disburses nearly $100 million in claims each year, and its data base of missing owners has names of nearly 7 million people. See id. Since 1971, Delaware has taken in $451.2 million of lost assets into its general fund as well as receiving a $216.5 million settlement reached in 1995 after a dispute with New York as to which state was entitled to abandoned property related to corporate stock. See Dale Dallabrida, "Lost Money" Is Delaware's Gain, GANNETT NEWS SERVICE, June 5, 1998, available in LEXIS, News Library, current news File. Massachusetts collected more than $90 million in unclaimed property in 1995. See Daniel Golden, Finders Keepers, BOSTON GLOBE, Apr. 30, 1996 (Metro/Region), at 1.

[FN7]. See UNIF. UNCLAIMED PROPERTY ACT, Prefatory Note (Amended 1985), 8B U.L.A. 104 (Supp. 2000).

[FN8]. See infra note 86.

[FN9]. It has been estimated that states have returned 4% of all unclaimed property they have collected. Currently, they are returning each year approximately 25% of the dollar amount of collections for that year. See Mendenhall, supra note 1, at Cl; Golden, supra note 6, at 1.

[FN10]. See generally Unif. Unclaimed Property Act, 8B U.L.A. 103 (Supp. 2000); for history of amendment, see id., Prefatory Note, 8B U.L.A. 104 (Supp. 2000).

[FN11]. 8B U.L.A. 567 (1994).

[FN12]. Michael I. Saltzman, Providing Protection in State Unclaimed Property Audits, 2000 TNT 243-85 (Dec. 18, 2000).

[FN13]. See generally ST. TAX REP. (CCH).

[FN14]. Todd R. Stimmel. Unclaimed Property: A Credit Risk Liability, 84 CREDIT WORLD 13 (1996).

[FN15]. Gary Heinlein, Lucky 46,000 Can Lay Claim to $17 Million: State Looks for Owners of Long-Forgotten Cash, Assets and Valuables, DETROIT NEWS, May 18, 1997, at A1.

[FN16]. See Laura Pedersen-Pietersen, Minding Your Business: Getting the Goods on Missing Goods, N.Y. TIMES, July 6, 1997, § 3, at 5; The Money Club (CNBC News Transcript, July 10, 1997); The Money Club (CNBC Transcript, July 4, 1997); CNN Today (CNN television broadcast Mar. 12, 1997); Kelly D. Smith, How to Find Your Share of $30 Billion in Lost Money, MONEY, Nov. 1996, at 22.

[FN17]. See Dallabrida, supra note 6.

[FN18]. See the National Association of Unclaimed Property Administrators, available at http://www.unclaimed.org/ (last visited Dec. 31, 2000) (searchable database for 26 states and addresses for the respective unclaimed property offices in all 50 states).

[FN19]. See Dallabrida, supra note 6. A survey of unclaimed property administrators conducted by the author in 1997 [hereinafter Survey] found that in Massachusetts the average collection is $100 with the majority between $50-$100; in New York, in 1996, the average collection was $44 with 65% under $100, and Illinois had an average claim of $1,295. (Survey on file with author.)

[FN20]. Louisiana presented one widow with a check for $1 million, representing the proceeds of a matured bond her late husband had purchased. See Heinlein, supra note 15. One long-deceased Boston candy maker had $3,000,000 in unclaimed property. See Daniel Golden, Finders Keepers, BOSTON GLOBE, May 1, 1996 (National/Foreign), at 12. New York paid $4.7 million to the Cambodian government in 1995. Massachusetts has 20-25 claims per year over $100,000. Illinois has many claims annually between $250,000 and $500,000. See Survey, supra note 19.

[FN21]. See Suellen M. Wolfe, Escheat and the Concept of Apportionment: A Bright Line Test to Slice a Shadow, 27 ARIZ. ST. L.J. 173 (1995); Note, Origins and Development of Modern Escheat, 61 COLUM. L. REV. 1319 (1961); Jo Beth Prewitt, Note, Unclaimed Property—A Potential Source of Non-Tax Revenue, 45 MO. L. REV. 493 (1980); Ray H. Garrison, Escheats, Abandoned Property Acts, and Their Revenue Aspects, 35 KY. L.J. 302 (1947); Andrew W. McThenia, Jr. & David J. Epstein, Issues of Sovereignty in

Escheat and the Uniform Unclaimed Property Act, 40 WASH. & LEE L. REV. 1429 (1983); R. Perry Sentell, Jr., Escheat, Unclaimed Property and the Supreme Court, 17 CASE W. RES. L. REV. 50 (1965); James J. Shestack, Disposition of Unclaimed Property—A Proposed Model Act, 46 NW. U. L. REV. 48 (1951); Comment, A Survey of State Abandoned or Unclaimed Property Statutes, 9 ST. LOUIS U. L.J. 85 (1964); Susan T. Kelly, Unclaimed Billions: Federal Encroachment on States' Right in Abandoned Property, 33 B.C. L. REV. 1037 (1992); K. Reed Mayo, Virginia's Acquisition of Unclaimed and Abandoned Personal Property, 27 WM. & MARY L. REV. 409 (1986); Billy F. Hicks, Escheat in Texas: A Current Look at the Intangible Issue, 29 SW. L.J. 575 (1975); Note, Modern Rationales of Escheat, 112 U. PA. L. REV. 95 (1963); Note, Escheat of Corporate Dividends, 65 HARV. L. REV. 1408 (1952).

[FN22]. See, e.g., I.R.C. § § 6013, 6161, 6652, 6662, 6709.

[FN23]. See, e.g., Daniel Halperin, Valuing Personal Consumption: Cost versus Value and the Impact of Insurance, 1 FLA. TAX REV. 1 (1992); Louis Kaplow, The Income Tax as Insurance: The Casualty Loss and Medical Deductions and the Exclusion of Medical Insurance Premiums, 79 CAL. L. REV. 1485 (1991); Thomas Griffith, Theories of Personal Deductions in the Income Tax, 40 HASTINGS L.J. 343 (1989); Stanley A. Koppelman, Personal Deductions under an Ideal Income Tax, 43 TAX L. REV. 679 (1988); Joel S. Newman, Of Taxes and Other Casualties, 34 HASTINGS L.J. 941 (1983); Mark G. Kelman, Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World, 31 STAN. L. REV. 831 (1979); William D. Andrews, Personal Deductions in an Ideal Income Tax, 86 HARV. L. REV. 309 (1972).

[FN24]. Note that not all tax policy issues—in particular not equity, distributional issues, but these are the issues that bear on this problem—need to decide what to do with administrative questions.

[FN25]. See HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 206 (1938)

[FN26]. Andrews, supra note 23, at 309, 325. Haig has explained, "Modern economic analysis recognizes that fundamentally income is a flow of satisfactions, of intangible psychological experiences." Robert M. Haig, The Concept of Income—Economic and Legal Aspects, in READINGS IN THE ECONOMICS OF TAXATION 54, 55 (R. Mugrave & C. Shoup eds., 1959), quoted in Halperin, supra note 23, at 1, 6.

[FN27]. Andrews, supra note 23.

[FN28]. Kelman, supra note 23, at 834.

[FN29]. Id. at 83

[FN30]. Id. at 859-60 n.87. He continues, "But the deductions for losses of previously appropriated property are more bothersome; they come more and more to resemble other disappointments with purchased commodities." Id.

[FN31]. Id. at 843 (emphasis in original).

[FN32]. Id. at 838.

[FN33]. Koppelman, supra note 23, at 709. For a discussion of tax issues somewhat the inverse of inadvertence—whether the compulsive nature of a taxpayer's behavior prevents compulsive gambler Zarin from realizing cancellation of indebtedness income, see Daniel Shaviro, The Man Who Lost Too Much: Zarin v. Commissioner and the Measurement of Taxable Consumption, 45 TAX L. REV. 215 (1990).

[FN34]. Halperin, supra note 23, at 6.

[FN35]. Id. at 23.

[FN36]. Professor Halperin, for example, has written in defense of the deduction for casualty losses:

> In a statistical sense, of course, destruction by fire is one of the hazards of home ownership "voluntarily" assumed when the taxpayer chooses to buy a personal residence. But if a dog can distinguish between being kicked and being stumbled over, as Holmes asserted, we can properly distinguish between the minor frustrations of life—a cigarette burn in a rug, a dented fender, a quarter lost when fumbling for change to put in a parking meter— and major casualties ("sudden, unexpected and unusual") events that do not "commonly occur in the ordinary course of day-to-day living.

Halperin, supra note 23, at 14.

[FN37]. Newman, supra note 23, at 951. Professor Newman continues, "Our tax system generally espouses the notion that negligence is not material." Id. at 952. He bases this conclusion on the absence of a requirement in either the casualty loss or the medical expense deduction sections that the deductible personal expenses be reasonable. Therefore, he reasons, such expenses may be unreasonable and could be deducted even if they resulted from negligence. See id. at 952 n.36. Believing both that "no expenditure which is the result of conscious choice should be deductible" and that negligent losses should be deductible as casualties, he would characterize negligent acts as involuntary and deductible as a casualty loss. Id. at 949-50.

[FN38]. See Michael A. Livingston, Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy, 83 CORNELL L. REV. 365, 378 n.35 (1998).

[FN39]. WILLIAM A. KLEIN & JOSEPH BANKMAN, FEDERAL INCOME TAXATION 23 (10th ed. 1994).

[FN40]. As discussed, however, the situation might be different with holders of the property. See infra p. 22.

[FN41]. See David A. Weisbach, Line Drawing, Doctrine, and Efficiency in the Tax Law, 84 CORNELL L. REV. 1627, 1650-51 (1999).

[FN42]. See id.; Livingston, supra note 38, at 365, 381 n.54.

[FN43]. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE AND POLICY 27 (2d ed. 1999).

[FN44]. Roy Blough & Carl Shoup, A Report on the Federal Revenue System Submitted to the Undersecretary of the Treasury Roswell Magill, reprinted in 70 TAX NOTES 1071, 1151 (1996).

[FN45]. Douglas Holtz-Eakin, The Uneasy Empirical Case for Abolishing the Estate Tax, 51 TAX L. REV. 495, 508 (1996) (emphasis in original).

[FN46]. William D. Andrews, The Accessions Tax Proposal, 22 TAX L. REV. 589, 590 (1967).

[FN47]. See ANDREOLI & SPOTSWOOD, supra note 4, at 3-3.

[FN48]. See State of California v. Savings Union Bank and Trust Co., 199 P. 26, 27 (Cal. 1921).

[FN49]. See id.

[FN50]. See Unif. Disposition of Unclaimed Property Act, 8A U.L.A. 267 (1993).

[FN51]. See id. at 207.

[FN52]. See Unif. Unclaimed Property Act, 8B U.L.A. 567 (1993).

[FN53]. See ANDREOLI & SPOTSWOOD, supra note 4, at 4-4.

[FN54]. See UNIF. UNCLAIMED PROPERTY ACT (amended 1995), 8B U.L.A. 103 (Supp. 2000).

[FN55]. See id.

[FN56]. See id. § 2(a) at 110.

[FN57]. See id.

[FN58]. Id. § 1(2) at 106.

[FN59]. Id. § 1(6) at 106.

[FN60]. See id. § 7(a) at 119.

[FN61]. See id. § 2(a)(12) at 111.

[FN62]. Id. § 2(a)(3) at 111.

[FN63]. Id. § 2, cmt. at 112.

[FN64]. See id. § 2, at 110; ANDREOLI & SPOTSWOOD, supra note 4, at NEW DEV-7.

[FN65]. See ANDREOLI & SPOTSWOOD, supra note 4, at CA-2, MA-2, NY-2.

[FN66]. See Unif. Unclaimed Property Act § § 7, 8 (amended 1999), 8B U.L.A. 119 (Supp. 2000).

[FN67]. See id. § 7(b)(1)(2) at 119.

[FN68]. Id. § 7 cmt., 8B U.L.A. 119-120 (Supp. 2000).

[FN69]. Id. § 10(b) at 122.

[FN70]. See id.

[FN71]. See id. § 9(a) at 121.

[FN72]. See id.

[FN73]. See, e.g., Cal. Civ. Proc. Code § 1531(e) (West 1997).

[FN74]. See Unif. Unclaimed Property Act § 12(a) (amended 1995), 8B U.L.A. 124 (Supp. 2000). The Comment suggests that this section is not applicable to money, except for money that is considered a "collector's specie having value greater than the face value of the money as cash." Id. at 125.

[FN75]. See id. § 12(b) at 124.

[FN76]. See id.

[FN77]. See Cal. Civ. Proc. Code § 1563 (West 1997).

[FN78]. See ANDREOLI & SPOTSWOOD, supra note 4, at NV-23.

[FN79]. See id. at NY-88.

[FN80]. See Unif. Unclaimed Property Act § 13(a), 8B U.L.A. 126 (Supp. 2000). Illinois transfers the funds to the state pension plan; Florida uses the money for education. See Ill. Comp. Stat. § 1025/18 (West 1998); Fla. Stat. ch. 717.123 (1998).

[FN81]. See Unif. Unclaimed Property Act § 13(a) (amended 1995), 8B U.L.A. 588 (Supp. 2000).

[FN82]. See id. California every month transfers the excess over $50,000 into the general fund. This can be done more often if deemed necessary. Massachusetts keeps up to $500,000 in an unclaimed property fund but not at a constant rate; at the end of the year all funds are transferred to the general fund. Arizona keeps a minimum of $100,000 in a separate unclaimed property fund. See Survey, supra note 19.

[FN83]. See id.

[FN84]. Unif. Unclaimed Property Act § 1(11) (amended 1995), 8B U.L.A. 107 (Supp. 2000).

[FN85]. Id. § 11, at 123.

[FN86]. See id.

[FN87]. Id.

[FN88]. Id.

[FN89]. See Neb. Rev. Stat. § 44-4845(1) (1998).

[FN90]. For example, in California, owners whose claims are allowed receive the amount of the claim plus interest "at the rate of 5 percent compounded annually or the current interest rate received upon deposit held in the Pooled Money Investment Account, whichever is lower . . . for the period the property was on deposit in the Unclaimed Property Fund." See Cal. Civ. Proc. Code § 1540(c) (West 1997). For other state examples, see infra note 205.

[FN91]. See Wolfe, supra note 21, at 249 n.89 (quoting Delaware Special Master in Delaware v. New York, 113 S. Ct. 1550 (1993)).

[FN92]. Other items, such as gift certificates, utility deposits, or life insurance proceeds, would not. Yet other items, such as annuity payments, would be part income and part recovery of basis. See I.R.C. § 72 (2000).

[FN93]. Treas. Reg. § 1.446-1(c)(1)(i) (2000).

[FN94]. Theodore P. Seto, Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (And No More), 106 YALE L.J. 1449, 1480 (1997).

[FN95]. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 105,3.1 (2d ed. 1992).

[FN96]. Treas. Reg. § 1.451-2(a) (2000).

[FN97]. BITTKER & LOKKEN, supra note 95, at ¶ 105.3.3, at 105.52 (emphasis added).

[FN98]. Treas. Reg. § 1.451-2(b) (2000).

[FN99]. Loose v. United States, 74 F.2d 147, 150 (8th Cir. 1948).

[FN100]. Id.

[FN101]. Id. at 148.

[FN102]. Id. at 150.

[FN103]. Id. at 150.

[FN104]. BITTKER & LOKKEN, supra note 95, at ¶ 105.3.3.

[FN105]. See text, infra pp. 160-63. Of course, in some cases the statute will not have run, particularly if the six-year limit applies. See id. In such cases, owners recovering property will owe tax and should file amended returns to avoid deficiency assessments. Here and throughout the article, I assume that the conditions for application of the statutory mitigation provisions, particularly a determination, have not been satisfied. See I.R.C. § § 1311-1314 (2000).

[FN106]. Furstenberg v. Commissioner, 83 T.C. 755, 792 (1984).

[FN107]. Hamilton Nat'l Bank of Chattanooga v. Comm'r, 29 B.T.A. 63, 67 (1933).

[FN108]. Furstenberg, 83 T.C. at 792. The court also commented, "This is clearly not a case in which petitioner 'turned her back' on the income by taking any affirmative steps to delay receipt of the check." Id. Property becomes unclaimed property only if the taxpayer fails to take any affirmative steps.

[FN109]. Id.

[FN110]. See Unif. Unclaimed Property Act § 7(e) (amended 1995), 8B U.L.A. 612 (Supp. 2000).

[FN111]. 37 T.C.M. (CCH) 42 (1978).

[FN112]. Id.

[FN113]. Id.

[FN114]. Id.

[FN115]. Id. at 45.

[FN116]. 32 T.C.M. (CCH) at 44.

[FN117]. Id. at 44-45.

[FN118]. Id.

[FN119]. See Michael G. Wagner, Big Windfalls Lose Gusto in Unclaimed Property Case, L.A. TIMES, May 4, 1997, at A1 (describing a suit by former shareholders of Blue Chip Stamp for failure of transfer agent to give them notice of merger with Berkshire Hathaway with subsequent transfer and sale of shares by state of California under unclaimed property law for far less than value of shares at time owners located).

[FN120]. See infra Part V.

[FN121]. Indeed, under the unclaimed property laws, a state takes possession of unclaimed funds when they are "presumed abandoned." Unif. Unclaimed Property Act § 4 (amended 1995) at 72. Thus, the question of whether an abandonment loss is allowed might arise at the time the state takes possession, rather than when the owner begins inactivity. Even if such is the timing, the analysis and conclusions above would be the same.

[FN122]. See Treas. Reg. § 1.165-1 (2000).

[FN123]. See id. at § § 1.165-2(a), 1.167(a)-8(a).

[FN124]. Id. at § 1.167(a)-8(a).

[FN125]. Id.

[FN126]. See Golden Gate Disposal Co. v. CIR, 38 T.C.M (CCH) 835, 837 (1979), aff'd, 642 F.2d 455 (9th Cir. 1981).

[FN127]. Unif. Unclaimed Property Act § 2(a) (amended 1995).

[FN128]. See infra notes 130, 133 & 135.

[FN129]. See infra note 144.

[FN130]. 23 T.C. 527, 532 (1954).

[FN131]. Id. at 532.

[FN132]. Id. The court's discussion echoes strongly the "claim of right" doctrine. See North American Oil Consolidated v. Burnet, 286 U.S. 417 (1932).

[FN133]. 55 T.C.M. (CCH) 1736 (1988).

[FN134]. Id. at 1742.

[FN135]. 57 T.C. 58, 89 (1971).

[FN136]. Id. at 89.

[FN137]. See id. at 90.

[FN138]. Gen. Couns. Mem. 36,076 (Nov. 11, 1974).

[FN139]. See id.

[FN140]. See id.

[FN141]. The General Counsel Memorandum explains,

[a]n unclaimed amount will cease to be a true liability or be regarded as such when (1) the taxpayer asserts dominion over it as its own or (2) a reasonable period of time passes as determined by experience during which the amount remains unclaimed or during which the taxpayer is unable to locate the true owner.

Id.

[FN142]. See id.

[FN143]. Id.

[FN144]. 493 U.S. 203, 214 (1990).

[FN145]. See id. at 204.

[FN146]. See id. at 204-05.

[FN147]. See id.

[FN148]. See id.

[FN149]. See Indianapolis Power & Light Co., 493 U.S. at 204-05.

[FN150]. See id. at 205.

[FN151]. See Ind. Code § 32-9-1-6(a)(1988). From 1974-77 only about $9,000 escheated to the state.

[FN152]. 493 U.S. at 206.

[FN153]. See id. at 210.

[FN154]. See id. at 207-08.

[FN155]. Id. at 209.

[FN156]. Id. at 210.

[FN157]. Indianapolis Power & Light Co., 493 U.S. at 214.

[FN158]. See 88 T.C. at 969.

[FN159]. See generally Commissioner v. Indianapolis Power & Light Co., 493 U.S. 203 (1990).

[FN160]. See id. at 207-14.

[FN161]. William D. Popkin, The Taxation of Borrowing, 56 IND. L.J. 43, 46 (1980). For Professor Popkin the "critical distinction between embezzlement and borrowing is that the embezzler usually has much greater control over whether and when to repay the funds." Id. He also notes the "undesirability of the embezzler's activity." Id. at 47.

[FN162]. James v. United States, 366 U.S. 213, 219 (1961).

[FN163]. Glenn E. Coven, Redefining Debt: Of Indianapolis Power and Fictitious Interest, 10 VA. TAX REV. 587, 589, 618 (1990).

[FN164]. Id. at 644. He explains:

When a receipt is offset by a repayment obligation that bears a below-market stated rate of interest, the amount of the receipt that should be treated as a loan, and excluded from income, is the amount for which the present value of the actual interest established by the parties would represent a market rate of interest.

Id. at 643-44. If $10,000 is 'loaned' at 6% when market is 10%, $6,000 would be treated as debt and excluded and $4,000 included in income. See id. at 644, example 2.

[FN165]. George K. Yin, Of Indianapolis Power and Lights and the Definition of Debt: Another View, 11 VA. TAX REV. 467, 474 (1991).

[FN166]. William A. Klein, The UCLA Tax Policy Conference: Tailor to the Emperor with No Clothes: The Supreme Court's Tax Rules for Deposits and Advance Payments, 41 UCLA L. Rev. 1685, 1710 (1994). For Professor Klein the best, albeit weak, defense of the judicially developed rules distinguishing loans from advanced payments is that for the typical loan there is little uncertainty as to the future obligation and that the present value of the future obligations differs little from the amount of loan proceeds, while the offsetting obligation with respect to advanced payments is less certain. See id. at 1712-13.

[FN167]. Gen. Couns. Mem. 36,076, supra note 138.

[FN168]. Id.

[FN169]. Id.

[FN170]. See I.R.C. § 7872(c)(2000). Loan is defined broadly for purposes of this section. Under the proposed regulations, it includes "any transaction under which the owner of money permits another person to use the money for a period of time after which the money is to be transferred to the owner or applied according to an express or implied agreement with the owner." Below-Market Loans, 50 Fed. Reg. 33553-01 (1985) (to be codified at 26 C.F.R. pt. 1.7872-2(a)(1)). "Loan" also includes an amount that "is treated for Federal tax purposes as a deposit rather than as a prepayment." Below-Market Loans, 50 Fed. Reg. 33553-01 (1985) (to be codified at 26 C.F.R. pt. 1-7872- 2(b)(1)(i)). Under § 7872, the borrower is deemed to have received the imputed interest as a nonloan payment from the lender and to have paid the lender the imputed interest. See I.R.C. § 7872(a)(1)(2000). Characterization of this nonloan payment to the borrower will depend on the relationship between the borrower and the lender. See I.R.C. § 7872(c) (2000). For example, if an employer makes an interest-free demand loan of $1,000 to an employee when the AFR is 9%, foregone interest will be $90. On the last day of each calendar year, the employer will be deemed to pay $90 to the employee as compensation and the employee is deemed to pay the employer $90 as interest. For term loans, somewhat different rules, rules that recharacterize some of the original principal as a nonloan payment: the provision separates out unstated interest on such loans by bifurcating a cash payment that purports to be the receipt of a loan into two parts. The first portion, which is treated as the principal amount of a loan, is calculated by discounting all payments to present value, using the applicable federal rate. The remainder is treated as an outright nonloan payment. The nonloan payment will represent imputed interest; the borrower will be deemed to have paid this amount to the lender as interest under the original issue discount rules.2

[FN171]. See I.R.C. § 7872(c)(2000). The tests for tax avoidance loans requires that a "principal purpose" of the interest arrangements be "the avoidance of any Federal tax." I.R.C. § 7872(c)(3)(B)(2000). These loans do not satisfy that test. Such a test, like so much in the tax code, requires an intention, not carelessness, on the part of the taxpayer.

[FN172]. Gen. Couns. Mem. 36,076, supra note 138.

[FN173]. KLEIN & BANKMAN, supra note 39, at 1711 offers the following:

It sometimes happens that a tax detriment for one participant in a transaction is offset by a tax benefit to another participant. The person who suffers the detriment may in effect pay a tax as a surrogate for the person who should have been taxed on the benefit. For example, under current tax rules the auto club that receives and must report as income an advance payment of membership dues suffers a tax detriment because its income is overstated, but the member making the advance payment enjoys benefit by escaping tax on the implicit interest earned on the advance payment. It is unreasonable to assume, however, that the detriment and the benefit will always, or even generally, be equal in amount.

See generally Daniel I. Halperin, Interest in Disguise: Taxing the "Time Value of Money," 95 YALE L.J. 506 (1986).

[FN174]. See Bituminous Casualty Corp, 57 T.C. 58 (1971).

[FN175]. See James, 366 U.S. 213 (1961).

[FN176]. See supra note 7 and accompanying text (establishing UUPA in part to avoid "windfalls" to holders).

[FN177]. See Treas. Reg. § 1.61-14; Cesarini v. United States, 296 F. Supp. 3, 6 (N.D. Ohio 1969), aff'd per curiam, 428 F.2d 812 (6th Cir. 1970). A holder that included these amounts in income would be able to take a later deduction for any property paid to the owner or the state at a later date. Cf. Lawrence A. Zelenak & Martin J. McMahon, Jr., Taxing Baseballs and Other Found Property, 84 TAX NOTES 1299 (1999) and Joseph M. Dodge, Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying the 'Claim of Right Doctrine' to Found Objects, Including Record-Setting Baseballs, 5 FLA. TAX REV. 685 (2000). This article does not discuss the claim of right doctrine because neither holders nor the state invoke a claim of right as to the presumed abandoned property.

[FN178]. UNIF. UNCLAIMED PROPERTY ACT, Prefatory Note, 8B U.L.A. 104 (Supp. 2000).

[FN179]. See 1 DAVID J. EPSTEIN ET AL., UNCLAIMED PROPERTY LAW AND REPORTING FORMS § 1.05 (1990).

[FN180]. UUPA requires publication of owner's name in the county of last known address by November 30 of the year following the year in which the property was acquired by the state, if the amount is over $50. UUPA, § 9, 8B U.L.A. 121-22 (Supp. 2000).

[FN181]. 333 U.S. 541, 546-47 (1948).

[FN182]. ANDREOLI & SPOTSWOOD, supra note 4, at 1995 Supplement, New Dev-5. This language did not appear in the Preface as adopted. See UUPA, Prefatory Note, 8B U.L.A. 104 (Supp. 2000).

[FN183]. Id. at 3-6.

[FN184]. See supra note 7.

[FN185]. See supra note 127.

[FN186]. "It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements." Restatement (Second) of Agency § 1 cmt. b

(1958). Under the tax regulations, an agent is not a "fiduciary" for tax purposes. See Treas. Reg. § 301.7701-6(b)(2) (2000).

[FN187]. See Survey, supra note 19. Texas transfers everything to the unclaimed property fund. Id. Massachusetts retains about $500,000. Id. California transfers the excess over $50,000 into the general fund at the end of each month or sooner if deemed necessary. Id. New York retains no reserve in the unclaimed property fund. Id.

[FN188]. Id.

[FN189]. Id.

[FN190]. See supra note 132.

[FN191]. BITTKER & LOKKEN, supra note 95, at ¶ 82.4.1.

[FN192]. Treas. Reg. § 301.6903-1(d) (2000).

[FN193]. Id. at § 301.7701-4(a).

[FN194]. See, e.g., Restatement (Third) of Trusts § 227 (1992) ("The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would . . .").

[FN195]. See AUSTIN W. SCOTT, SCOTT ON TRUSTS § 227.9 (4th ed. 1988). Under the tax law as well, a trust requires the existence of some separate entity. See generally BITTKER & LOKKEN, supra note 95, at ¶ 82.4.1.

[FN196]. Unif. Unclaimed Property Act § 13, 8B U.L.A. 126 (Supp. 2000).

[FN197]. Id. § 13, cmt. at 126.

[FN198]. See Treas. Reg. § 301.6903-1(a) (2000).

[FN199]. Id. at § 301.6903-1(b).

[FN200]. I.R.C. § 6012(b)(2) (2000). See also Treas. Reg. § 1.6012- 1(a)(5) (2000). Under current law, agents may file a return only with a power of attorney from the taxpayer, and "a receiver appointed by authority of law in possession of only a part of the property of an individual" has no responsibility to file a tax return. I.R.C. § 6012(b)(2).

[FN201]. See supra notes 1 and 7 and accompanying text.

[FN202]. See supra notes 1 and 6 and accompanying text. New York estimates the percentage of returned property at 22.4% as of March 31, 1997; Texas at 68.09% in 1997, and Arizona at 48%. See Survey, supra note 19.

[FN203]. See Indianapolis Power & Light Co., 493 U.S. at 203 (1990).

[FN204]. See text, supra pp. 152-54.

[FN205]. UUPA requires payment of specified rate unless actual amount accrued is lower for a period no longer than 10 years. Unif. Unclaimed Property Act § 11, 8B U.L.A. 123-24 (Supp. 2000). California pays 5%, West Virginia pays 4%, Illinois and Texas pay no interest, while Massachusetts pays 5% on interest-bearing accounts and 1% on all others. See Survey, supra note 19.

[FN206]. Judge Posner has observed that, in effect, unclaimed property represents "an interest-free loan to the state—in perpetuity if the owner never shows up to claim it." Commonwealth Edison Co. v. Vega, 174 F.3d 870, 872 (7th Cir. 1999).

[FN207]. See Gen. Couns. Mem. 14,407 (Jan. 28, 1935); Rev. Rul. 71- 131, 1971-1 C.B. 29; Rev. Rul. 71-132, 1971-1 C.B. 30; Ellen P. Aprill, The Integral, the Essential, and the Instrumental: Federal Income Tax Treatment of Governmental Affiliates, 23 J. CORP. L. 803, 803 (1998); Ellen P. Aprill, Excluding the Income of State and Local Governments: The Need for Congressional Action, 26 GA. L. REV. 421, 430-32, 450-65 (1992).

[FN208]. See infra note 246.

[FN209]. Perhaps, in the case of unclaimed property, the state's preservation of the property may be a form of implicit interest. Perhaps, because of the failure of the state to pay adequate interest, owners who recover property would have to recharacterize some of the recovered principal as original issue discount.

[FN210]. Gene Meyer, Abandoned Stocks Sold, KAN. CITY STAR, Jan. 15, 1997, at F4, available in LEXIS, News Library, current news File. An IRS agent quoted in the article noted that "there's not much precedent in IRS records to help decide that." Id.

[FN211]. See, e.g., Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 566-67 (1991) (tax characterization turning on legal entitlements); Lee A. Sheppard, NYSBA Tax Section Meeting: The Six Unanswered Questions Facing Policymakers, 65 TAX NOTES 158, 158-159 (1994) (reporting Deputy Assistant Secretary Cynthia Beerbower as criticizing tax law for relying on old wisdom and explaining that legal ownership has become irrelevant; economic ownership is what matters).

[FN212]. Owner is defined under the UUPA as "a person who has a legal or equitable interest in property . . . or the person's legal representative." UUPA § 1(11), 8B U.L.A. 107 (Supp. 2000).

[FN213]. Illinois represents itself as having had very stringent requirements for making a claim. Texas turns down 41% and Arizona 21% of claims made. See Survey, supra note 19.

[FN214]. See ANDREOLI & SPOTTSWOOD, supra note 4.

[FN215]. I.R.C. § 6501(a) (2000).

[FN216]. Id. at § 6211(a).

[FN217]. I.R.C. § 6501(e)(1)(A) (2000).

[FN218]. Dallabrida, supra note 6.

[FN219]. See Survey, supra note 19.

[FN220]. See supra note 20 and accompanying text.

[FN221]. See ANDREOLI & SPOTTSWOOD, supra note 4.

[FN222]. See supra notes 4, 5 and accompanying text. California Governor Gray Davis' 2000-2001 budget included more than $1 million "to boost staffing for Controller Kathleen Connell to help her return" unclaimed property to the 5.2 million Californians whose property the state was holding. Julie Tamaki, Small Items Add Up in Big-Money State Budget, L.A. TIMES, Jan. 18, 2000. at A3, available in LEXIS, News Library, current news File. The 1999-2000 budget had just $15,000 for such efforts. Id.

[FN223]. Wagner, supra note 119 (interviewing Jundt, Executive Director of the National Association of Unclaimed Property Administrators).

[FN224]. Blair, supra note 6. New York's Website "has logged 2.7 million searches since its introduction last July." Id.

[FN225]. See Cissy Taylor, State Treasury to Audit Property Accounts, UNION LEADER, Feb. 23, 1999, at A1, available in LEXIS, News Library, current news File.

[FN226]. See supra note 20 and accompanying text. New York has one $700,000 unclaimed account. See Blair, supra note 6. Illinois awarded $500,000 to one man, while another single disbursement worth $900,000 goes unclaimed. See Bob Kurson, Check the List of Lost Loot in Sunday's Sun-Times, CHI. SUN-TIMES, Feb. 19, 1999, at 16. Louisiana paid out $1.2 million to one person in a single claim. See Mark Hanson, Program Features Local Woman: NBC Program was in Bismarck for Story on Unclaimed Property, BISMARCK TRIB., Jan. 31, 1999, at 2A.

[FN227]. 40 B.T.A.M. 333 (1939), acq. 1957-1 C.B. 4.

[FN228]. See id. at 333-34.

[FN229]. Id. at 335.

[FN230]. Rev. Rul. 81-277, 1981-2 C.B. 15.

[FN231]. Id.

[FN232]. Id.

[FN233]. BITTKER & LOKKEN, supra note 95, ¶ 5.8.1.

[FN234]. I.R.C. § 111(a)(2000).

[FN235]. Id.

[FN236]. See Lawrence Zelenak, The Taxation of Tax Indemnity Payments: Recovery of Capital and the Contours of Gross Income, 46 TAX L. REV. 381, 388- 89 (1991).

[FN237]. Id. at 388-89.

[FN238]. Id. at 388 n.42 (1991)(citing WILLIAM KLEIN ET AL., FEDERAL INCOME TAXATION 190 (8th ed. 1990)).

[FN239]. Bank of Am. Nat'l Trust and Sav. Ass'n v. Cory, 210 Cal. Rptr. 351, 355 (1985).

[FN240]. ANDREOLI & SPOTSWOOD, supra note 4, at 1-6 (Supp. 1995).

[FN241]. See supra Part IV.B.

[FN242]. See supra note 5 and accompanying text.

[FN243]. Treas. Reg. § 1.451-2(a).

[FN244]. See Estate of Shelton v. Commissioner, 612 F.2d 1276, 1280 (10th Cir. 1980).

[FN245]. But claims are not always accepted. See infra note 246. Moreover, when claims are made by heirs of a deceased owner, the state may require considerable additional information. A colleague of mine attempting to make a claim as the devisee of her late mother was asked not only for her mother's will, but also her father's will and, when she supplied his will, for several years of tax returns for a trust established in her mother's will.

[FN246]. See Unif. Unclaimed Property Act § 15(b), 8B U.L.A. 128 (Supp. 2000).

[FN247]. See id. at § 15 at 128.

[FN248]. See id. § 16 at 129.

[FN249]. See supra note 90.

[FN250]. But see supra section II.A, noting that taxpayers in other contexts also use the doctrine of constructive receipt as a protection.

[FN251]. I.R.C. § 103(a)(2000).

[FN252]. Id. at § 150(a)(1).

[FN253]. See H.R. Conf. Rep. No. 99-841, at II-686 (1986). See also Comm'r v. Meyer, 104 F.2d 155, 157 (2d Cir. 1939)(notes for the purchase of land); Kings County Dev. Co. v. Comm'r, 93 F.2d 33, 35 (9th Cir. 1937) (deferred payment contract for the purchase of real estate); Newlin Mach. Corp. v. Comm'r, 28 T.C. 837, 842 (1957)(installment obligations given to a vendor of equipment).

[FN254]. I.R.C. § 149(a)(2)(A)(2000).

[FN255]. But cf. Power Equip. Co. v. United States, 748 F.2d 1130, 1137 (6th Cir. 1984)(finding that interest on deferred sale of equipment was not properly authorized under state law); Thompson v. Comm'r, 52 T.C.M. (P-H) 245, 265 (1983), aff'd in part, 761 F.2d 259 (1985)(stating that the IRS failed to meet its burden of proving that contracts was not authorized by the state); Rev. Rul. 78-140, 1978-1 C.B. 27 (holding that interest on lottery winnings are not excludable under § 103).

[FN256]. California, for example, issues a Form 1099 when it pays interest on successful claims. See Survey, supra note 19.

[FN257]. Whether or not owners are in constructive receipt of any interest paid by the state and whether or not the interest can be excluded under § 103, there is also the question of whether the original issue discount ("OID") rules of § § 1271-75 might apply to require economic accrual of interest. If OID rules apply, owners would be treated as receiving interest from the state each year. OID rules apply when debt instruments are publicly offered or issued for money or publicly traded property. The state's obligations under unclaimed property laws do not seem to fall into these categories, but the issue is not free of doubt.

[FN258]. Difficult tax issues arise not only in connection with interest paid by the state but also in connection with sales of unclaimed stock by the state. If the state had sold stock at a gain, for example, the amount recovered by the claimant for this unclaimed property will exceed the claimant's basis in the property. If such sale is treated as having been made by the state either as owner or borrower, this excess should be taxed to the claimant upon recovery. Moreover, in such a case, any gain would be treated as ordinary income because the recovery is not a sale or exchange on this recovery. Claimants, however, are unlikely to realize that they might have gain. California, for example, gives claimants 1099's only for interest paid. It does not report the amount realized from its sale of any unclaimed stock or notify the claimant that the sale may have generated gain or loss. See Survey, supra note 19.

[FN259]. Treas. Reg. § 20.0-2(a).

[FN260]. Treas. Reg. § 20.2033-1(a) (2000).

[FN261]. BITTKER & LOKKEN, supra note 95, at ¶ 125.2.

[FN262]. Unif. Unclaimed Property Act § 1(11) at 107, 8B U.L.A. 107 (Supp. 2000).

[FN263]. See Morgan v. Comm'r, 309 U.S. 78, 80 (1940); see generally RICHARD B. STEPHENS ET AL., FEDERAL ESTATE AND GIFT TAXATION ¶ 4.05[2] (7th ed. 1997 & Supp. 1998).

[FN264]. I.R.C. § 2033 (2000) provides, "The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."

[FN265]. See Tech. Adv. Mem. 92-07-004 (Oct. 21, 1991) (illegal drugs); Tech. Adv. Mem. 91-52-005 (Aug. 30, 1991) (artwork stolen in Germany and France during World War II).

[FN266]. See Tech. Adv. Mem. 92-07-004; Tech. Adv. Mem. 91-52-005 (Aug. 30, 1991).

[FN267]. Tech. Adv. Mem. 92-07-004 (Oct. 21, 1991) (quoting Burnet v. Wells, 289 U.S. 670, 678 (1933)).

[FN268]. Estate of DiMarco v. Commissioner, 87 T.C. 653, 663 (1986).

[FN269]. A set of similar uncertainties is apparent for earnings on unclaimed property or interest accrued by the state to the date of the apparent owner's death and paid by the state after the death merits particular discussion. The original owner's interest in these amounts does not arise after or because of death. One leading treatise states, "Accrued interest, whether it be on savings in a bank account, on a bond or a note arising out of an installment sale, or some less formal credit extension or loan made by the decedent during his life, is a section 2033 gross estate inclusion." STEPHENS ET AL., supra note 263, at ¶ 4.05[4]. The treatise further notes that, although Schedule C of Form 706 is not clear, "it is appropriate practice to state as separate items the principal amount of the note and interest accrued to the date of death," and cites Treas. Reg. § 20.2032-1(d)(1) (2000) for comparison. Id. If the state is seen as the borrower of the unclaimed property, the decedent has made a loan to the state, albeit an unintentional loan, and interest would be included. Again, the current law is unclear, because of the uncertainty as to who is the owner of the property for tax purposes after the state takes possession. Interest paid also raises questions about income in respect of a decedent ("IRD"), which includes "those amounts to which a decedent was entitled as gross income but which were not property includible in computing his taxable income for the taxable year ending with the date of his death or for a previous taxable year under the method of accounting employed by the decedent." Treas. Reg. § 1.691(a)-1(b) (1999). The regulations specify that IRD includes "[i]ncome to which the decedent had a contingent claim at the time of his death." Id. at § 1.691(a)-1(b)(3). The deceased apparent owner had a right to interest under the unclaimed property laws, but may not have known of that right. Should a contingent right extend so far? In addition, if approval of the claim by the state is a condition precedent to the state's obligation to pay interest and the claim is filed by the apparent owner's heirs or personal representative after the apparent owner's death, none of the interest paid would be IRD.

[FN270]. Thus, an unclaimed property statute or regulation might specify that interest and dividends are constructively received by owners when the holders made the funds available. It could make clear that any interest (and gain realized upon sale of unclaimed stock) earned on the unclaimed property would be tax-exempt to the state and would be taxable only when paid to the claimant. The statute could clarify that other amounts representing recovery of capital would be taxed as such and not as a windfall. It could determine whether both principal and interest would be included in the apparent owner's gross estate. Congress could also specify that interest paid by states under unclaimed property laws could be treated as interest on a state obligation and thus excluded under § 103. By requiring distributions of unclaimed property to be reported to the Secretary of Treasury, the Treasury Department would be able to ensure that amounts are included in the estate of a decedent. Reports of distributions from unclaimed property accounts would also aid the Internal Revenue Service to track amounts constructively received for which the statute of limitations has not run, and state treasuries could also benefit from being able to tax such amounts.

[FN271]. Kelman, supra note 23, at 838.

[FN272]. Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1199 (1994).

[FN273]. See generally Edward J. McCaffery, Cognitive Theory and Tax, 41 UCLAL. REV. 1861 (1994).